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Supreme Court, U.S.
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In The
Supreme Court of the United States

WAGNER-MEINERT, INC.
Petitioner,
v.
EDA CONTROLS CORP.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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November, 2007

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QUESTIONS PRESENTED

Respondent EDA Controls Corp. manufactured and supplied equipment and services, including installation, for the detection of ammonia gases for businesses. Petitioner requested a quote from Respondent to provide, install and train the employees of a customer, and Respondent provided a quote for same. The system was designed and installed by Respondent. Later, an ammonia release and fire occurred, causing damage in excess of $12 million. Petitioner was sued and ultimately held responsible. During the course of that litigation, Petitioner sued Respondent for failure to provide the services and training and submitted various causes of action,

including implied/oral contract and torts.[1] Before discovery even proceeded, Respondent moved for judgment on the pleadings pursuant to Fed.R. Civ.Proc. 12(c). While giving lip service to the requirement of accepting the factual allegations as true, the District Court interpreted the "predominant purpose" of the relationship between the parties as a sales contract rather than a general contract for the provision of services and training and dismissed the complaint based upon a shorter sales statute of limitations, rather than the general breach of contract statute of limitations. The Sixth Circuit Court of Appeals affirmed in *Wagner-Meinert, Inc. v. EDA Controls Corp.*, United States Court of Appeals for the Sixth Circuit, Case No. 06-3777, 2007 U.S. App. LEXIS

[1] The complaint was detailed with 54 paragraphs, including and incorporating various documents such as the 45 paragraph complaint in the underlying action.

4879, 62 U.C.C. Rep. Serv. 2d (Callaghan) 167 (Feb. 23, 2007). (App. B) The questions presented are:

Whether, on a motion for judgment on the pleadings, the court must accept as true the allegations of the pleadings of the non-moving party, construing them in a light most favorable to the non-moving party, and determine whether that party can prove any set of facts that would entitle it to relief?

Whether courts may regard a simple quote and responding memo to constitute the entire written agreement of the parties without any such integration language, and contrary to the allegations in the complaint, in the context of a motion for judgment on the pleadings?

Whether courts may determine, as a matter of law, without discovery, that an agreement to

provide services and training, in addition to a product manufactured and sold, is a contract primarily for sale rather than the rendition of services?

Whether the Sixth Circuit Court of Appeals incorrectly affirmed judgment on the pleadings and denied rehearing, expressly stating that there were "no disputed facts as to the nature of the sales contract at issue," despite many allegations regarding the provisions of service, installation and training?

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PETITION FOR A WRIT OF CERTIORARI

Wagner-Meinert, Inc., an Indiana corporation, respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 23, 2007 (Petition for Rehearing denied July 30, 2007), in order to correct the erroneous application of Fed. R. Civ. P. 12(c) which requires that courts accept as true all factual allegations on movant before granting judgment on the pleadings. The Sixth Circuit Court, as well as other circuit courts, have not done so, or have only given lip service to doing so. The Sixth Circuit Court, as well as other courts in the United States, needs clarification and instruction regarding the *proper application* of Fed. R. Civ. P. 12(c), including the requirement that all allegations of the non-

movant, as well as all inferences to be derived thereform are to be accepted as true for purposes of a motion for judgment on the pleadings.

OPINIONS BELOW

The opinion of the United States Court of appeals for the Sixth Circuit is dated February 23, 2007, and the order denying petition for rehearing is dated July 30, 2007. They are not published in the Federal Reporter, but the former decision is published at 2007 U.S. App. LEXIS 4879. (App. B) The decision and order granting motion for judgment on the pleadings by District Judge James G. Carr, United States District Court for the Northern District of Ohio, Western Division, is reported, *Wagner-Meinert, Inc. v. EDA Controls Corp.*, 444 F.Supp. 2d 800, 2006 U.S. Dist. LEXIS 18732 (N.D. Ohio 2007). (App. C)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1332 based upon diversity of the parties.

The judgment of the United States Court of appeals for the Sixth Circuit was entered on February 23, 2007. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on July 30, 2007. (App. A) Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

RELEVANT PROVISIONS INVOLVED

Fed. R. Civ. P. 12(c), judgment on the pleadings, is involved. This civil action, based upon diversity of citizenship, was decided based upon the Ohio Statute of Limitations. The statutes involved

are the following provisions of the Ohio Revised Code: R.C. §2305.07 (contract not in writing (6 years)); R.C. §2305.06 (contracts in writing (15 years)); and R.C. §1302.98 (contracts for sale – UCC 2-725 (4 years)). (App. J, I, K)

STATEMENT

Fed. R. Civ. P. 12(c), forming the basis for the judgment of the courts below, states as follows:

> (c) Motion for Judgment on the Pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Respondent EDA Controls Corp. (hereinafter "EDA" or "Respondent") was in the business of manufacturing, supplying, and installing equipment and services related to the detection of various gases, including ammonia. Petitioner Wagner-Meinert, Inc. (hereinafter "WMI" or "Petitioner") engaged EDA for the design, manufacture, installation, service and training for an ammonia detection system at Petitioner's customer, Frozen Specialties, Inc. (hereinafter "FSI") in Archbold, Ohio. EDA prepared a quotation for the ammonia gas monitoring system, including "onsite checkout to insure the system is functioning properly, and train the end user customer on system operation". WMI executed an order form accepting the quotation of EDA in its entirety. (App. H14 – H22)

In 1999, a fire occurred at FSI and EDA's detection system failed to detect the ammonia release. The insurer for FSI paid related damages and sued WMI, seeking damages in excess of Twelve Million Dollars ($12,000,000). EDA did not intervene in that litigation, despite its awareness of it. In 2004, WMI instituted this lawsuit, alleging various causes of action and detailed allegations regarding the facts supporting them. (App. H) EDA filed a motion for judgment on the pleadings[1] and WMI filed its brief opposing that motion.[2]

Among the many allegations of the complaint were the following:

> (1) That EDA failed to properly train the FSI employees in the operation and maintenance of the system, causing the fire damage to be substantially worse (App. H3 – H5);

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[1] (App. F)
[2] (App. E).

(2) That EDA had formed an express contract with WMI requiring EDA to provide specific services, manufacture and supply equipment fit for its intended use, but EDA failed to provide these services and manufactured and supplied defective equipment (App. H4 – H5);

(3) That if the subrogated insurer was entitled to recover, WMI was entitled to indemnity due to an express agreement with EDA (App. H6 – H7);

(4) That WMI and EDA also had an implied contract where EDA agreed, among other things, to provide services and manufacture equipment fit for its intended purposes, which EDA breached, also entitling WMI to indemnity (App. H7 – H8);

(5) That the equipment EDA manufactured was defective, which required indemnity by EDA to WMI (App. H7 – H8);

(6) That by failing to provide services as agreed, EDA failed to perform its obligations under the contract, which would result in an obligation of EDA to indemnify or contribute to any judgment (App. H9 H10);

(7) That due to the failure to provide services as agreed, as well as the

manufacture of defective equipment, EDA also has an obligation to contribute to any judgment against WMI pursuant to R.C. §2307.25 (App. H10 – H11); and

(8) That EDA, under the contract, had an express and/or implied duty to provide WMI with services and equipment and negligently failed to do so, and also failed to provide the services as agreed, rendering EDA responsible for indemnity or contribution (App. H11 – H12).

The District Court, in the order granting EDA's motion for judgment on the pleadings, stated that WMI entered into a "written contract" with EDA "for the sale and installment of an ammonia detection system". (App. C4) WMI, however, had not relied upon a "written contract", but an "express contract", which may be written or oral. Nevertheless, the District Court stated that WMI "attached a copy of the party's contract" to its complaint, which "stated the terms for the sale and

installation" (not services) of the ammonia detection system.

The District Court found that the complaint "centers around this contract, and Wagner-Meinert does not allege any other agreement exists", erroneously stating that the WMI complaint "pleads an action for a breach of an express contract, not an action for a contract implied at law or fact". (App. C-4) The District Court then discussed – and rejected – WMI's complaint under implied contracts for indemnity, and determined that "it would be unjust" and that "the parties could have contracted for indemnity and did not do so". (App. C-10)

WMI appealed to the United States Court of Appeals for the Sixth Circuit. It argued that the court's decision that the agreement was "primarily

one for the sale of goods" was improperly done without the benefit of any deposition testimony, evidence or affidavits from any party regarding or explaining the allegations of the complaint. In response, EDA presented argument of the "parole evidence rule" which only applies to a final written integration of a contract/agreement signed by the parties. *Glazer v. Lehman Bros., Inc.*, 394 Fed. 3d 444, at 445 (6th Cir. 2005), citing *Galmish v. Cicchini*, 90 Ohio St. 3d 22 (2000). That argument apparently ignored the evidence referenced in the incorporated attachment to the complaint, which doesn't contain any such language, a letter from the EDA representative stating that under the "onsite start-up service, we will provide onsite checkout to ensure *the system is functioning properly and train the end-user customer on system operation*.[3]

[3] (App. H-13).

The Sixth Circuit Court of Appeals affirmed dismissal of this case based upon the motion for judgment on the pleadings. In so doing, it stated that "the ammonia detection system was installed by Wagner-Meinert, not by EDA", although acknowledging that EDA provided "onsite training to personnel from Frozen Specialites". (App. B-2) It further stated that "the contract in this case "**is the purchase order** sent by Wagner-Meinert to EDA based on EDA's price quotation". (App. B-6) The court then found that "[b]ecause we find no disputed facts as to the nature of the **sales contract** at issue, it was proper for the District Court to rule as a matter of law on the nature of the contract and to determine that the four year statute was applicable." (App. B-6) The court further held that the "complaint here, however,

states no facts that would support either an oral contract or an 'implied contract'." (App. B-7) The court further noted that the District Court "found that Wagner-Meinert installed the system and we do not hold this finding clearly erroneous". (App. B-2) The Court of Appeals stated as follows:

> Because the sales contract includes both goods and services, we will view the contract as "mixed contract". In a mixed contract for goods and services, the test for inclusion or exclusion under §1302.98 with its four-year statute of limitations is whether the predominate [sic] factor and purpose of the contract is the rendition of services, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved. . . . **Because we find no disputed facts as to the nature of the sales contract at issue, it was proper for the District Court to rule as a matter of law on the nature of the contract and to determine that the four-year statute was applicable**".

(App. B-4) (Emphasis added). The Court of Appeals affirmed dismissal based on judgment on the

pleadings, and denied the petition for rehearing. (App. A, B-9)

This Court should now consider Petitioner's claim that judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), rendered without the opportunity for any discovery was inappropriate and, in fact, misapplied by the trial court and affirmed by the Court of Appeals. This honorable Supreme Court is now presented with the opportunity to clarify that both the factual allegations and "mixed questions" of law and fact stated in the complaint must be taken as true for the purposes of a motion for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c), and to further clarify that courts may not simply give "lip service" to the requirements of that rule.

In so doing, the Court should reverse the Sixth Circuit's opinion affirming judgment on the pleadings in this case.

REASONS FOR GRANTING THE PETITION

There are two major reasons why this Petition should be granted. First, courts throughout the country need clear authority for determining when and under what circumstances a judgment on the pleadings should be rendered, and cases dismissed, without discovery or evidence extrinsic to the pleadings. Secondly, courts throughout the country need clear authority and instruction for determining, as a matter of law, whether the predominant factor, thrust or purpose of a mixed or hybrid contract is the rendition of services, with goods incidentally involved or is, instead, a sale with labor/service incidentally

involved to determine the appropriate statute of limitations.

A. Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c)

This Court has never addressed Fed. R. Civ. P. 12(c) in any manner that explains it for the direction of courts below. Petitioner respectfully submits that authoritative instruction from this honorable Court would benefit all courts in the United States, as well as public perception and respect for the system.

Federal courts, it is submitted, need instruction and clarification regarding the requirements and application of Fed. R. Civ. P. 12(c). Petitioner respectfully submits that this is an appropriate case; a detailed and extensive complaint was filed in February of 2004, but was

stayed pending resolution of the related litigation. That stay was lifted in 2005. (App. C-2) Shortly thereafter, Respondent filed its motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (App. F) That was done before any discovery was completed (given the stay) and judgment was granted in favor of Respondent, over the Petitioner's objection and brief opposing that motion, in the United States District Court. In doing so, the court's opinion states that it "construes the complaint in the light most favorable to the plaintiff, accepts all factual allegations as true, and determines whether 'the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." *Wagner-Meinert, Inc. v. EDA Controls Corp.*, 444 F.Supp. 2d 800 at 802, 2006 U.S. Dist. LEXIS

18732 (N.D. Ohio 2007). It did so citing *Ziegler v. IBP Hog Mkt., Inc.*, 249 F. 3d 509 (6th Cir. 2001), an earlier case where judgment on the pleadings had been granted by Judge Carr, but was vacated and remanded by the Court of Appeals.

The Advisory Committee notes to Rule 12(c) are not particularly explanatory or instructive regarding the use or application of that provision, as distinguished from other motions and proceedings. The decisions of this honorable Court, it is submitted, do not specifically address motions for judgment on the pleadings in any manner that would explain the rule or distinguish it from other rules (summary judgment, failure to state a claim upon which relief can be granted, etc.). The extent of confusion is further demonstrated by *Gazette v. City of Pontiac*, 41 F. 3d 1061, at 1064 (6th Cir.

1994), which states that the court must "accept as true all factual allegations and permissible inferences therein", when compared with the decision in *Perry v. Am. Tobacco Co., Inc.*, 324 F. 3d 845, at 848 (6th Cir. 2003), indicating that the courts need not accept "unwarranted inferences of fact". *Teasdale v. Heck*, 499 F.Supp. 3d 967 (S.D. Ohio 2007), citing *Perry v. Am. Tobacco Co., Inc.*, 324 F. 3d 845, at 848 (6th Cir. 2003).

The courts below stated the general rule providing, essentially, lip service to its requirements and then disregarded that standard in its decision and analysis. While the trial court gave lip service to the proposition under Rule 12(c) that it "construes the complaint in the light most favorable to the plaintiff, accepts all factual allegations as true, and determines whether the

plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief", it then went 180 degrees and submitted its order/judgment completely ignoring facts alleged in the complaint pertaining to agreements regarding the design, installation, and end-user training of the ammonia detection system, agreements entered into which were not necessarily *written*. The court mischaracterized a price quote and acceptance as the entire agreement. The court further found that "Wagner-Meinert attached a copy of the parties' contract to its complaint". "The complaint centers around this contract, and Wagner-Meinert does not allege any other agreement exists. Thus, Wagner-Meinert's complaint pleads an action for breach of an express contract, not an action for a contract implied at law or fact." There is simply no way at

all that such determinations in fact construe the complaint most favorably to plaintiff, accepts the factual allegations of the complaint as true, even regardless of any inferences that may be drawn from the allegations of the complaint. In short, it is simply wrong and contrary to the lip service articulation of the Rule 12(c) standard.

The Sixth Circuit Court of Appeals similarly referenced a "written contract" and gave other indications of the reasons for its judgment, which are directly contrary to the 12(c) standard. How can a factual dispute such as which party installed the system be found in favor of the movant for judgment on the pleadings, despite the opposition and dispute of the non-movant? The Court of Appeals noted that the District Court "found that Wagner-Meinert installed the system and we do not

hold this finding clearly erroneous", and affirmed the judgment of the Northern District of Ohio.

In its Petition for Rehearing and Suggestion for Rehearing En Banc, Petitioner submitted that the order of the court below was directly contrary to the procedure accompanying a motion for judgment on the pleadings, which procedure had been specifically stated by the trial court and the court below in other cases. *Ziegler v. IBP Hog Mkt., Inc.*, 249 F. 3d 509, at 511-12 (6th Cir. 2001) and more recently in *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F. 3d 521 (6th Cir. 2006).

Petitioner pointed out that the court below had regarded a simple quote and responding memo to constitute the entire agreement of the parties without any such language in the quote/response and contrary to the allegations of the complaint,

including facts that can be proven regarding an oral agreement. The court below, however, rejected the Petition for Rehearing, concluding "that the issues raised in the petition were fully considered upon the original submission and decision of the case". (App. A)

In other contexts, it is observed that "courts . . . will pay lip service to standard rules, even while they strain and distort the rules to reach sound results". *Steifel, II v. Hopkins*, 477 F. 2d 1116, at 1125 (6th Cir. 1773) citing Comment, Domicile of Choice – Fixed Rules, 36 Yale L.J. 408, at 412 (1927). The dissent in *Van Hook v. Anderson*, 488 F. 3d 411 (6th Cir. 2007), perceived the majority as paying lip service to the rule of *Miranda*, criticizing the holding of the majority. See also, *United States of America v. McClain*, 444 F. 3d 537 (6th Cir.

2006), where Circuit Judge Martin dissented from the denial of a rehearing en banc, stating that the majority/panel "errs . . . by acknowledging the deterrence rationale – by paying lip service to it – but failing to discuss its relevance to this case". (Id., at 541) *Moore v. City of Harriman*, 272 F. 3d 769 (6th Cir. 2001), Suhrheinrich, dissenting, states that the majority paid lip service to a rule, but in reality adopted a different rule or test. (Id., at 791).

Other circuits appear to have demonstrated uncertainty or lack of uniformity regarding motions for judgments on the pleadings. See, *National Fidelity Life Ins. Co. v. Karagonis*, 811 F. 2d 357, at 358 (7th Cir. 1987); *Falls Riverway Realty v. City of Niagra Falls*, 754 F. 2d 49, at 53 (2nd Cir. 1985), indicating that the court may consider in its discretion materials outside the pleadings.

It is respectfully submitted that the Third Circuit correctly determined that parties such as Petitioner must be given the safeguard of having all of the allegations of fact taken as true and having all inferences favorable to the non-movant drawn in the context of a motion for judgment on the pleadings. *Bryson v. Brand Insulations, Inc.* 621 F. 2d 556 (3rd Cir. 1980). The United States District Court in Connecticut, it is respectfully submitted, properly determined that in ruling on a motion for judgment on the pleadings, a court may not dismiss the complaint unless the non-movant cannot beyond doubt prove any facts to support its claim. *Grease Monkey Intern., Inc. v. Watkins*, 808 F.Supp. 111 (D. Conn. 1992).

In *John S. Clark Co., Inc. v. United National Ins. Co.*, 304 F.Supp. 2d 758 (M.D.N.C. 2004), the

court held it would utilize its discretion *not* to consider materials submitted by the non-movant; in *Frerks By Frerks v. Shalalh*, 848 F.Supp. 340, (E.D.N.Y. 1994), affirmed 52 F. 3d 412, the court found that upon a motion for judgment on the pleadings, it had discretion to consider materials outside the pleadings.

The need for clarification and instruction from this honorable Court, Petitioner submits, is clear, given the "discretion" of courts as to what materials to consider. This case, it is submitted, is appropriate to consider and address the requirements pertaining to a motion for judgment on the pleadings. The courts below gave lip service to the requirement of accepting the allegations of the complaint as true, but did not do so.

B. Clear Authority Is Needed For Courts To Determine The Appropriate Statute Of Limitations For Contracts Involving A Mixture Of Sales And Service To Determine – As A Matter Of Law – The "Predominant Purpose" Of The Contract.

This case does involve Respondent EDA's "sale" of an ammonia detection system, but also the installation, service, and training regarding its use – not by Petitioner, but by FSI, the company to whom Respondent's product was sold and the company that needed and used it. These circumstances, it is submitted, demonstrate that it was inappropriate to determine simply from the pleadings, without evidence, affidavits or depositions explaining the circumstances, that the sale aspects were predominant.

Federal courts are required under diversity jurisdiction to decide the application of the law of

virtually every state regarding the application of the appropriate statute of limitations – general contract or the Uniform Commercial Code sales statutes. A thorough review, Petitioner submits, demonstrates the need for authoritative and uniform law.

In *Propulson Technologies, Inc. v. Attwood Corp.*, 369 F. 3d 896 (5th Cir. 2004), the District Court had held that the agreement was a "hybrid contract" for both services and goods, and that the predominant purpose of the contract was the provision of services rather than the sale of goods. It did so *after the presentation of evidence at trial.* The 5th Circuit reversed, finding a "hybrid analysis" inappropriate regarding the contract at issue. (Id. at 901.)

In *Novamedix v. NDM Acquisition Corp.*, 166 F. 3d 1177 (Fed. Cir. 1999), the court applied New York law, quoting from *Consolidated Edison Co. of New York v. Westinghouse Elec. Corp.*, 567 F.Supp. 358, at 362:

> The New York courts appeared to have rejected an approach of applying sales law to the sales aspect of a transaction which combines both sales and service features, requiring instead that the applicable law be determined by looking to the essential nature of the underlying contract.

(Id. at 1182.)

The Eleventh Circuit has stated that "the question whether a contract is predominantly for goods or services is generally one of fact". *BMC Industries, Inc. v. Barth Industries, Inc.*, 165 F. 3d 1322 (11th Cir. 1998), at 1331. In that case, however, the court concluded that there were no factual issues regarding the terms of the contract,

and the District Court decided as a matter of law that the contract was for services. The Court of Appeals reversed, finding that as a matter of law it was a transaction in goods, applying the "predominant factor" test to the contract. The opinion cited courts from numerous jurisdictions and stated:

> Most courts follow the "predominant factor" test to determine whether such hybrid contracts are transactions in goods . . . or transactions in services. . . . Under this test, the court determines "whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . .".

(Id., at 1329-30.) (Numerous citations omitted.)

The First Circuit in *Cambridge Plating Co., Inc. v. Napco, Inc.*, 991 F. 2d 21 (1st Cir. 1993), acknowledged that determining the type of contract

at issue may typically be a jury function. (Id., at 24, citing the Ninth Circuit decision in *United States v. City of Twin Falls*, 806 F. 2d 862 (9th Cir. 1986).

This case, it is submitted, involves an erroneous application of judgment on the pleadings – without discovery, evidence, or trial – that the complaint did not state a cause of action which could in any way be determined primarily for services. It is certainly difficult to find cases of that nature anywhere, but Petitioner submits that courts in the United States need instruction on when and how to determine the applicability of general contracts, statutes of limitation or the UCC provisions.

CONCLUSION

In summary, the actual language of Fed. R. Civ. R. P. 12(c) does not make it clear that on a motion for judgment on the pleadings, courts must in fact accept as true all the material allegations of the complaint and inferences to be derived therefrom. While many courts have given lip service to that proposition, some courts, including the courts below in this case, completely disregard it.

There is further no clear or definitive decision from this honorable Court in determining which statute of limitations to apply in hybrid cases involving mixed sales and service. This case, it is submitted, is appropriate to illustrate that such decision should not be made as a matter of law before any discovery or trial.

For the foregoing reasons, Petitioner requests that the Petition for Writ Certiorari be granted.

Respectfully submitted,

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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

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Control Corp., For Judgment
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Ex.B Plaintiff Accepting Defendant's Offer in Writing, 05/23/95 . H21 - H22

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§ 2305.07 Contract not in Writing ..... J1 - J1

§ 1302.98 Statute of Limitation in Contracts for Sale ..... K1 - K2

§ 2307.25 Right of Contribution ..... L1 - L4

No. 06-3777

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAGNER-MEINERT, INC.,
Plaintiff-Appellant,

v.

EDA CONTROLS CORPORATION,
Defendant-Appellee.

FILED
July 30, 2007
Leonard Green,
Clerk

BEFORE: MERRITT, DAUGHTREY, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition or rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY THE ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

NOT RECOMMENDED FOR PUBLICATION

File Name: 07a0149n.06
Filed: February 23, 2007

No. 06-3777

FILED
February 23, 2007

Leonard Green, Clerk

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Wagner-Meinert, Inc.,	)	
Plaintiff-Appellant,	)	
	)	**ON APPEAL** FROM
v.	)	THE UNITED
	)	STATES DISTRICT
EDA Controls	)	COURT FOR THE
Corporation,	)	NORTHERN
Defendant-Appellee.	)	DISTRICT OF OHIO

BEFORE: Merritt, Daughtrey, and Griffin, Circuit Judges.

MERRITT, Circuit Judge. The District Court granted judgment on the pleadings against Wagner-Meinert, Inc., the plaintiff, under Rule 12(b)(6) and (c), and this appeal followed. In 1995, by written contract, Wagner-Meinert, Inc. became the agent of its customer, Frozen Specialties, Inc. (a

producer of frozen food) to design, build, install, maintain and manage an ammonia refrigeration system. As part of providing the refrigeration system, Wagner-Meinert contracted with EDA Controls Corporation to provide ammonia detection equipment for the refrigeration system to detect any release of ammonia in the refrigeration system. The ammonia detection system cost $13,228 and was delivered to Frozen Specialties in August 1995. The ammonia detection system was installed by Wagner-Meinert, not by EDA,[1] although EDA did provide a "check" of the system after it was installed by Wagner-Meinert and provided one day of onsite training to personnel from Frozen Specialties. No further goods or services

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[1]The parties dispute which company installed the ammonia detection system, with Wagner-Meinert claiming that EDA installed the system and EDA claiming that Wagner-Meinert installed it. Although not discussed as a factual dispute in the district court's order, the district court found that Wagner-Meinert installed the system and we do not hold this finding clearly erroneous. In any event, even if EDA installed the system, it would not change the outcome of this appeal.

were provided by EDA to Wagner-Meinert in connection with the ammonia detection system at Frozen Specialties, and the record indicates no further communication between the two parties concerning any aspect of the ammonia detection system until the events that gave rise to this lawsuit.

On January 16, 1999, three and one-half years after the ammonia detection system was installed, a fire broke out at Frozen Specialties, causing extensive damage reimbursed by insurance in the amount of $12,744,126.93. The cause of the fire is unknown, but Wagner-Meinert alleges that EDA's detection system failed to detect a release of ammonia that provided fuel for the fire, increasing the damage to Frozen Specialties. Wagner-Meinert further alleges that the failure of EDA to properly train the Frozen Specialties employees caused the fire damage to be substantially worse.

Frozen Specialties' insurer, Atlantic Mutual Insurance Company, paid the loss on the policy and, as the subrogee of Frozen Specialties' rights, brought an action against Wagner- Meinert alleging breach of

contract and negligence. EDA was not named as a party and Wagner-Meinert did not implead or otherwise seek to join EDA as a third party to the action so that the respective rights of all of these parties could be adjudicated in one action. The jury found Wagner-Meinert liable for breach of contract and awarded Atlantic Mutual $2,500,000. *Atlantic Mutual Ins. Co. v. Wagner- Meinert, Inc.*, No. 3:01CV7302 (N.D. Ohio Apr. 8,2004) (jury verdict) (J.A. at 68). Following the jury verdict, Wagner-Meinert and Atlantic Mutual settled the action for $3,000,000. Atlantic Mutual withdrew the negligence claim before the case was submitted to the jury, so the resulting verdict was only on the breach of contract claim.

Wagner-Meinert filed this diversity action in federal court against EDA in 2004 before the suit between Wagner-Meinert and Atlantic Mutual was resolved. By agreement of the parties, the action between Wagner-Meinert and EDA was stayed to await the outcome of the suit between Wager-Meinert and the insurance company. In May 2005, a year after

the jury trial concluded, the stay was lifted and the suit between Wagner-Meinert and EDA continued. Wagner-Meinert's complaint presents alternative counts for indemnification for breach of an "express contract," or "implied contract," or "negligent" performance of the contract and for contribution under Ohio Revised Code § 2307.25. (J.A. at 6) EDA filed a motion for judgment on the pleadings pursuant to Rule 12(c) which the district court granted on April 12, 2006. *Wagner-Meinert, Inc. v. EDA Controls Corp.*, 444 F. Supp. 2d 800 (N.D. Ohio 2006), J.A. at 36.

> Wagner-Meinert raises one issue on appeal phrased as follows:
>
> Whether the court erred to the prejudice of Appellant by granting a Motion for Judgment on the Pleadings and dismissing and closing Appellant's case when, in fact, the complaint filed by Plaintiff/Appellant, Wagner-Meinert, Inc., alleged numerous facts supporting the claims, including breach of contract (express and/or implied) and claims for contribution and indemnity pertaining to related litigation.

1. Breach of Contract. Wagner-Meinert's claims for breach of contract are barred by the four-year statute of limitations for contracts relating to the sale of goods, as the District Court concluded. O.R.C. § 1302.98(A). (An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.) Wagner-Meinert argues that the contract is not one for the sale of goods, but is instead a service contract that should be subject to the 15-year statute of limitations for general contracts in Ohio. This argument is clearly wrong.

The service portion of the contract was less than 5% of the contract price, and we agree with the District Court that it should be characterized as a contract for the sale of the system. The contract in this case is the purchase order sent by Wagner-Meinert to EDA based on EDA's price quotation. (JA. at 16-19) The purchase order itemizes the various components of the ammonia detection system and gives the amount to be paid as $13,228. This price includes $600 for an "On Site Start up Assistance," which the

contract specifies is for one day. The record indicates that this service was to train Frozen Specialties employees about the ammonia detection system. Because the sales contract includes both goods and services we will view the contract as "mixed" contract. In a mixed contract for goods and services, the test for inclusion or exclusion under § 1302.98 with its four-year statute of limitations is "whether the predominate factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved." *Allied Indus. Servo Corp. v. Kasle Iron & Metals, Inc.*, 62 Ohio App. 2d 144, 147 (1977). Because we find no disputed facts as to the nature of the sales contract at issue, it was proper for the district court to rule as a matter of law on the nature of the contract and to determine that the four year statute was applicable.

2. **Indemnification.** Ohio law defines indemnity as arising from "contract, either express or implied, and is the right of a person who has been

compelled to pay what another should have paid to require reimbursement." *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio St. 3d 238, 240 (1987) (citing *Travelers Indemn. Co. v. Trowbridge*, 41 Ohio St. 2d 11,14 (1975)). In other words, when a person is secondarily liable due to his relationship to the other party, and is compelled to pay damages to an injured party, he may recoup his loss for the entire amount of damages paid from the one who is actually at fault, and who, in fact, caused the injuries. *See Globe Indemn. Co. v. Schmitt*, 142 Ohio St. 595, 603 (1944). In an indemnity action, a plaintiff seeks complete reimbursement from the party primarily liable for the damages plaintiff has incurred. The complaint here, however, states no facts that would support either an oral contract or an "implied contract" based on the actions of the parties shifting the loss to EDA under a theory of indemnity. Nor does the complaint state facts that would support an indemnity action for restitution arising from the relative fault of joint tortfeasors. *See Restatement of Restitution*, §§ 89-98 (1937); Palmer, *Law of Restitution* § 10.6(c)(1978). After a trial in which the

jury returned a large verdict against plaintiff in this action, plaintiff is unable to state facts showing that EDA was responsible for the fire and should suffer the loss. Hence the District Court was correct in dismissing the indemnity count.

3. **Statutory Contribution**. A contribution action under Ohio law seeks to redistribute damages in tort based on a "tortfeasor's proportionate share of the common liability."[2] Wagner-Meinert alleges that

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[2]**2307.25 Right of contribution; settlements; subrogation; indemnity**

> (A) Except as otherwise provided in sections 2307.25 to 2307.28 of the Revised Code, if one or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's proportionate share of the common liability, and that tortfeasor's total recovery is limited to the amount paid

EDA failed "to perform its obligations under the contract" and hence "has an obligation to contribute to any judgment rendered against [it]." This claim for "contribution" for breach of contract does not come within the coverage of Ohio's contribution statute, as the District Court found, nor does the claim attempt to state how any "common [tort] liability" should be apportioned. The judgment against Warner-Meinert was in contract. The contribution count contains no factual or theoretical basis for shifting some of Wagner-Meinert' s liability to EDA.

For the foreging reasons, the judgment of the district court is affirmed.

> by that tortfeasor in excess of that tortfeasor's proportionate share. No tortfeasor may be compelled to make contribution beyond that tortfeasor's own proportionate share of the common liability. There is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been alleged and established. (Emphasis added.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Wagner-Meinert, Inc.,
Plaintiff,

Case No. 3:04CV7026

v.

ORDER

EDA Controls Corp.,
Defendant.

FILED
April 12, 2006
Northern District
of Ohio,
Clerk

Plaintiff Wagner-Meinert Inc. (Wagner-Meinert) brought suit against EDA Controls Corp. (EDA) for breach of express and implied contract, express and implied indemnification, contribution under O.RC. § 2307.25, and negligent breach of contract resulting in a duty to indemnify. Jurisdiction exists under 28 U.S.C. § 1332.

Pending is EDA's motion for judgment on the pleadings.[1] For the following reasons, defendant's motion will be granted.

Background

Wagner-Meinert contracted to design, install, maintain, and manage an ammonia refrigeration system for Frozen Specialties, Inc. (FSI), a producer of frozen foods. As part of its work on the ammonia refrigeration system, Wagner-Meinert entered into a written contract with EDA for the sale and installment of an ammonia detection system.

On January 16, 1999, a fire broke, which caused extensive damage, at FSI. The cause of this fire is unknown. Wagner-Meinert alleges EDA's ammonia detection system failed to detect a release of ammonia. The ammonia allegedly provided secondary fuel for the fire and increased the damage.

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[1]Wagner-Meinert incorporates the contract in its complaint. Accordingly, defendant's motion is properly considered under Rule 12(c) rather than Rule 56.

FSI was insured by Atlantic Mutual Insurance Company (Atlantic), which paid the loss on the policy and thereby succeeded to FSI's rights. Subsequently, Atlantic brought an action against *Wagner-Meinert, Atlantic Mutual Ins. Co. v. Wagner-Meinert Inc.*, 3:01CV7302, alleging negligence and breach of contract. It later dismissed the negligence claim. A jury found Wagner- Meinert liable for breach of contract and the parties later settled the action.

Wagner-Meinert filed this action in 2004, while Atlantic's suit against it was pending. By agreement of the parties, this court stayed the proceedings pending the outcome of that case. In May, 2005, this court lifted the stay.

Standard of Review

This court reviews a motion for judgment on the pleadings, Fed. R. Civ. P. 12(c), under the same standard used for a motion to dismiss, Fed. R. Civ. P. 12(b)(6). *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001). The court construes the complaint in the light most favorable to the plaintiff, accepts all factual allegations as true, and

determines whether "the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." Id. at 512.

Discussion

EDA argues judgment on the pleadings is warranted because: 1) the breach of contract claims are time-barred; 2) an implied contract action is barred because the parties had an express contract; 3) the contract contains no express indemnification agreement; 4) no action for implied indemnification can exist without tort liability; and 5) a contribution claim under O.RC. § 2307.25 applies only to joint tortfeasors.

I. Breach of Contract

As an initial matter, Wagner-Meinert attached a copy of the parties' contract to its complaint. The contract stated the terms for the sale and installation of the ammonia detection system. The complaint centers around this contract, and Wagner-Meinert does not allege any other agreement exists Thus, Wagner-Meinert's complaint pleads an action for a breach of an express contract, not an action for a

contract implied at law or fact. *See Lucas v. Costantini,* 13 Ohio App.3d 367, 369 (Ohio 1983).

EDA contends Wagner-Meinert's contract claims are time-barred because an action for breach of a sales contract has a four-year statute of limitations.

In response, Wagner-Meinert argues its claims are timely because the written contract was for a service, which has a fifteen year statute of limitations under O.RC. § 2305.06.

To determine whether a contract is one for the sale of a good or for a service, a court applies the predominant purpose test. *Allied Erecting & Dismantling Co. v. Auto Bailing Co.*, 69 Ohio App. 3d 502, 508 (1990). The predominant purpose test determines "'whether the predominant factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved.'" *Id.* (quoting *Allied Indus. Serv. Corp. v. Kasle Iron & Metals, Inc.*, 62 Ohio App. 2d 144, 147 (1977)).

Construing the complaint in the light most favorable to Wagner-Meinert, the parties' contract is for the sale of a good, the ammonia detection system. While EDA provided a start-up service under the contract, its value, $600, was a small percentage of the total contract price of $13,228. The contract describes this service as a one-day program to "provide on site checkout to insure the system is functioning properly, and train the end user on system operation."(Compl. Ex.A at 2.) Thus, the predominant purpose of the parties' contract was for the sale of the ammonia detection system, not the start-up service. Therefore, the contract is governed by the four-year statute of limitations applicable to sales contracts under O.RC. § 1302.98.

The parties executed this contract in 1995. At the latest, the alleged breach occurred when the fire broke out in 1999. Wagner-Meinert filed this action in 2004. Thus, Wagner-Meinert's contract claims are time-barred.[2]

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[2]To the extent Wagner-Meinert alleged breach of warranty claims, these claims are also governed by

II. Contribution

Wagner-Meinert alleged a claim for contribution under O.RC. § 2307.25. This statute provides:

> Except as otherwise provided in sections 2307.25 to 2307.28 of the Revised Code, if one or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's proportionate share ofthe common liability, and that tortfeasor's total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor's proportionate share. No tortfeasor may be compelled to make contribution beyond that tortfeasor's own proportionate share of the common liability. There is no right of contribution in favor of any tortfeasor

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the same four-year statute of limitations. *Ressallato. Burglar & Fire Alarms, Inc.*, 79 Ohio App. 3d 43, 48 (1992). Thus, any warranty claims would be time-barred.

> against whom an intentional tort claim has been alleged and established.

O.RC. § 2307.25(A).

"[C]ontribution statutes allow only a tortfeasor to make a claim for contribution to the extent that the tortfeasor has paid more than its share of liability." *St. Paul Fire and Marine Ins. Co. v. Cassens Transp. Co.*, 86 Fed. Appx. 869, 872 (6th Cir. 2004) (unpublished disposition).

As EDA points out in its motion, any liability Wagner-Meinert paid to Atlantic in the earlier action was in contract, and not in tort. Therefore, W agner-Meinert cannot seek contribution for such damages under O.RC. § 2307.25. Thus, this claim fails as a matter of law.

III. Indemnity

Wagner-Meinert seeks damages under both express and implied contracts for indemnity.

EDA argues no facts support an action for indemnity under an express contract because the parties' contract did not contain such an indemnity provision or obligation. It further contends no implied

contract for indemnity can exist because Wagner-Meinert incurred liability to Atlantic under a breach of contract action, not a negligence action.

Ohio law defines indemnity as arising "from contract, either express or implied, and is the right of a person who has been compelled to pay what another should have paid to require complete reimbursement." *Worth v. Aetna Cas. & Sur. Co.*, 32 Ohio 8t. 3d 238, 240 (1987) (citing *Travelers Indem. Co. v. Trowbridge*, 41 Ohio 8t. 2d 11, 13-14 (1975) (rev'd on other grounds)) (emphasis supplied). In an indemnity action, a plaintiff seeks complete reimbursement from the party primarily liable for damages he or she has incurred. *Reynolds v. Physicians Ins. Co. of Ohio*, 68 Ohio 8t. 3d 14, 16 (1993).

Wagner-Meinert does not allege EDA agreed to indemnify it outside of the parties' contract. The parties' contract, as noted, contains no express indemnification agreement. Accordingly, Wagner-Meinert fails to state an action for indemnity under an express contract.

Thus, the issue is whether Wagner-Meinert can seek damages under an implied contract for indemnity.[3]

In Ohio, "[i]mplied contracts of indemnity are reserved for those 'situations involving related tortfeasors, where the one committing the wrong is so related to a secondary party as to make the secondary party liable for the wrongs committed solely by the other.'" *Motorists Mut. Ins. Co. v. HuronRd. Hosp.*, 73 Ohio St. 3d 391, 394 (1995) (quoting Reynolds, 68 Ohio St. 3d at 16 (1993)) (emphasis supplied). Thus, an implied contract for indemnity exists "only within the context of a relationship wherein one party is found to be vicariously liable for the acts of a tortfeasor." *Indiana*

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[3]Plaintiffs cause of action seeking indemnity from EDA's alleged negligent breach of contract is construed as an action for indemnity under an implied contract.

Ins. Co. v. Barnes, 2005 WL 3304021, *3 (Ohio Ct. App. 2005) (citations omitted).[4]

The relationship between Wagner-Meinert and EDA is one of contracting parties, not related tortfeasors. Wagner-Meinert was not found vicariously liable for EDA's actions. It paid Atlantic damages after a jury found it breached a contract with FSI.

Wagner-Meinert, moreover, settled with Atlantic. It would be unjust for this court to order EDA to reimburse Wagner-Meinert for the complete amount of damages determined in a settlement agreement. *Reynolds*, 68 Ohio St. 3d at 16. As a final note, the parties could have contracted for indemnity and did not do so. *See, Cent. Illinois Pub. Serv. Co. v. Indus. Oil Tank & Line Cleaning Serv.*,

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[4]Examples of relationships in which courts have found implied indemnity contracts are "the wholesaler/retailer, abutting property owner/ municipality, independent contractor/employer, and master/servant." *Motorists Mut. Ins. Co.*, 73 Ohio St. 3d at 394 (citation omitted).

730 F. Supp. 1498,1506 (W.D.Mo.1990). Thus, Wagner-Meinert cannot seek relief under an implied contract for indemnity.

Therefore, Wagner-Meinert's claims for indemnity fail as a matter of law.

Conclusion

For the foregoing reasons, it is therefore,

ORDERED THAT defendant's motion for judgment on the pleadings is granted.

So ordered.

/s/ James G. Carr
James G. Carr
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Wagner-Meinert, Inc., *Plaintiff,*

Case No. 3:04CV7026

v.

JUDGEMENT ENTRY

EDA Controls Corp., *Defendant.*

FILED
April 12, 2006

Northern District
of Ohio,
Clerk

For the reasons stated in the opinion filed April 12, 2006, it is hereby .

Ordered that defendant's motion for defendant's motion for judgment on the pleadings shall be, and the same hereby is granted. Case closed.

So ordered.

/s/ James G. Carr
James G. Carr
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
January 23, 2006
Northern District
of Ohio,

Wagner-Meinert, Inc.,
Plaintiff,

Case NO. 3:04 CV 7026
Judge James G. Carr

v.

EDA Controls Corp.,
Defendant.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Now comes Plaintiff, Wagner-Meinert, Inc., by and through counsel, Andrew J. Ayers and Keith J. Watkins of Bahret & Associates Co., L.P.A., and pursuant to the applicable law and the pleadings before the Court, respectfully submits that the motion of Defendant for judgment on the pleadings should be denied in its entirety.

Before discussing the various arguments presented on behalf of movant, it appears that the standard of review is agreed upon by the parties. A motion for judgment on the pleadings is determined

according to the same standard as a motion to dismiss: construing the pleadings and evidence in a light most favorable to the party opposing the motion (Plaintiff here), the issue is whether that party can **prove any set of facts** that would entitle it to relief. *Ziegler v. IBP Hog Mkt., Inc.*, 249 F.3d 509, at 511-12 (6th Cir. 2001). The issue then is whether considering the allegations of the complaint as true, can the Plaintiff prove any set of facts entitling it to relief? It is respectfully submitted that the answer is affirmative.

Considering this standard, it is simply inappropriate for movant to request this Court to consider the six separate "causes of action" as "only three legal claims", or impliedly suggesting that Plaintiff is somehow limited to the various legal claims actually asserted in the pleadings. The standard and the issue Defendant has brought before the Court is whether ~~any set of facts exists in support~~ of its causes of action against Defendant.

Even Defendant impliedly acknowledges that at the time this accident was instituted (January 21,

2004), Plaintiff had been a Defendant in the Atlantic Mutual case which - along with breach of contract and other claims - had asserted negligence claims that were later dismissed.

Continuing with the procedural aspect of this motion, the similar provisions of Ohio law pertaining to motions to dismiss because of the statute of limitations "is erroneously granted where the complaint does not conclusively show on its face that the action is barred by the statute of limitations". *Velotta v. Leo Petronzo Landscaping, Inc.* (1982), 69 Ohio St.2d 376.

With this procedural overview and the basic standard, of which this Court IS well aware, pertaining to motions for judgment on the pleadings, it is submitted that based upon the applicable facts and law as more fully described below, the motion should be denied. [1]

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[1] Plaintiff submits that counsel for Defendant, in filing a motion for "judgment on the pleadings", wants to entice Plaintiff into submitting evidence, affidavits, and other material that would wind up

A. Relationship of the Parties

Despite Defendant's attempt to characterize the relationship between the parties as "primarily sales" along with admitted service, the fact of the matter is that this was a significant service scenario. The complaint's exhibits include "on site checkout to insure the system is functioning properly and train the end-user customer on system operation". (Complaint, Ex. A, p. 2, which is included in the "on site startup assistance", Id., p. 3.) Incorporating those documents, the complaint states in pertinent part as follows:

> 1. EDA was in the business of supplying equipment and services related to control systems, including for the detection of gases including ammonia, and Defendant was

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converting the motion into a motion for summary judgment under Fed.R.Civ. Proc. 56; Plaintiff does not do so, and submits that the parties (including Plaintiff) may file for summary judgment within the Court's existing deadline in February, 2006.

contacted to provide Plaintiff with "a quote for the design, manufacture, installation and end-user training of an ammonia detection system to be installed at Frozen Specialties, Inc. (Complaint, pars. 6-7);

2. Defendant offered to design and manufacture the system as well as provide on site installation and train the end-user. (Id., par. 9);

3. Plaintiff accepted Defendant's offer and purchased both the equipment and services from Defendant. (Complaint, par. 10);

4. On June 16, 1999, a fire occurred at FSI, the insurer of FSI alleging that the system failed to detect the ammonia release. (Complaint, par. 13) It was further alleged that Defendant failed to properly train the FSI employees in the operation and maintenance of the system, causing the fire damage to be substantially worse, resulting in the naming of Plaintiff as a Defendant in a separate lawsuit captioned, *Atlantic Mutual*

Insurance Co. v. Wagner-Meinert, Inc., Case No. 3:01 CV 7302, attached to the complaint herein as Exhibit C. (Complaint, par. 14 and Ex. C);

5. That Defendant formed an express contract with Plaintiff which required Defendant to provide specific services, manufacture and supply equipment fit for its intended use, but Defendant failed to provide these services and manufactured and supplied defective equipment. (Complaint, pars. 19-21);

6. That in the related litigation, if the subrogated insurer, Atlantic Mutual, was entitled to recover against Plaintiff, Plaintiff was entitled to indemnity due to an express agreement by Defendant (Id., pars. 22-24);

7. That Plaintiff and Defendant also had an implied contract where the Defendant agreed, among other things, to provide services and manufacture equipment fit for its intended purpose, which agreement

Defendant breached (Id., pars. 26, 28), also entitling Plaintiff to indemnity (Id., par. 31);

8. That the equipment Defendant manufactured was defective which, in the event of liability to Atlantic Mutual as the FSI insurer, required indemnity by Defendant to Plaintiff (Id., p. 38);

9. That among other things, by failing to provide services as agreed, as well as manufacturing and supplying defective equipment, Defendant failed to perform its obligations under the contract which (if Plaintiff were held liable to Atlantic Mutual) would result in an obligation of Defendant to indemnify Plaintiff or contribute to any judgment (Id., pars. 41-42);

10. That due to the same failure to provide services as agreed, as well as manufacture and supply of defective equipment, Defendant has an obligation to contribute to any judgment against Plaintiff in the related litigation (Id., par. 48), as well as contribute to any judgment in

that case pursuant to R.C. 2307.25 (Id., pars. 48-49);

11. That Defendant, under the contract (Ex. A), had an express and/ or implied duty to provide Plaintiff with services and equipment and Defendant negligently failed to do so, and also failed to provide the services as agreed (Id., par. 52-53, which renders Defendant responsible and "an obligation to indemnify Plaintiff or contribute to any judgment" rendered against the Plaintiff. (Id., par. 53-54).[2]

Construing the pleadings in a light most favorable to Plaintiff, it is respectfully submitted that Defendant is in violation of Rule 12(c) by asking this Court to characterize the deal and contract/ subcontract

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[2] Despite the fact that the allegations are considered true under the applicable rule, as an aside, the fact of the matter is that the jury in the related case concluded that the failure to provide the training to FSI was one of the factors that resulted in the failure to maintain the ammonia detection system and ultimately for the fire to get out of control.

between the parties as "primarily one for the sale of goods". (See, Plaintiff's Memorandum, p. 5.) That is the foothold and entire basis of the claim that the four-year statute of limitations pertaining to sales (R.C. 1302.98) applies. Based upon the express provisions of Rule 12(c), as well as the various applicable law and cases discussed below, it is respectfully submitted that Defendant's motion should be denied.

B. Law and Argument

There are, as clearly noted in the complaint, allegations (and truth) to the assertion of both express and implied contractual agreements between the parties. Defendant was, In essence, a "subcontractor", providing direct relationships on the job with FSI. It is worthy to note that none of the authorities upon which Defendant relies involve contractor/subcontractor relationships such as exist in this case. In *Terrace Creek Assoc. v. Smith* (May 18, 2001), 2001 Ohio App. LEXIS 2212, Montgomery Co. App., unreported (copy attached), a contractor engaged Woolpert to provide retention ponds to deal

with drainage, which Woolpert did and the contractor installed. The court of appeals determined that the breach of contract statute, R.C. 2305.06, applied and the action was brought within that time period.

It is submitted, that the allegations of the complaint are true and construing them in a light most favorable to Plaintiff, Plaintiff would be entitled to relief. The motion does not, therefore, comply with the basic premise of Fed. R. Civ. Proc. 12(c). Without suggesting anything to the contrary, the following authorities are discussed and presented to the Court for consideration.

This is a situation, it is submitted, where Plaintiff bears only secondary or vicarious responsibility for the damages claimed by the FSI insurer. It was the express obligation of Defendant to provide training and services regarding the actual installation of the ammonia detection system.

An implied contract of indemnity arises by operation of law and is based on the principle that everyone is responsible for his own negligence, and "if another person has been compelled, by the judgment

of the court having jurisdiction, to pay the damages which ought to have been paid by the wrongdoer, then those damages may be recovered from the wrongdoer". *Fort Defiance Constr. and Supply, Inc. v. Village of Grover Hill*, Ohio 3rd Appellate Dist. 1997, Ohio App. LEXIS 3117, unreported, (July 17, 1997), citing the Ohio Supreme Court decision in *Maryland Casualty Co. v. Frederick Co.* (1944), 142 Ohio St. 605. Ohio law, therefore, clearly recognizes an "implied contract of indemnity in favor of the parties secondarily liable against the person or persons primarily liable.". *Maryland Casualty Co.*, supra, syllabus par. 2. Simply because the related litigation involved a dismissal of one of the causes of action does not entitle Defendant in this case to some determination that the express and implied agreements before this Court are somehow not enforceable.

The general statute of limitations for breach of contracts IS 15 years (written, R.C. 2305.06) or 6 years should the Court consider it to be an oral

contract, despite the written evidence of it (R.C. 2305.07).

Defendant certainly had the option, should it desire to have done so, to intervene in the related litigation. Defendant's present argument that "contribution" is somehow no longer relevant is, it is submitted, incorrect. As stated in *Henry v. Consolidated Stores International Corp.*, 89 Ohio App.3d 417, (1993),

> Contribution, when it exists, is the right of a person who has been compelled to pay what another should have paid in part to require partial (usually proportionate) reimbursement and arises from principles of equity and natural justice. Indemnity, on the other hand, arises from contract, express or implied, and is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement.
>
> (Id., citing *Travelers Indemnity Co. v. Trowbridge* (1975), 41 Ohio St.2d 11, syllabus par. 2.)

As stated in *Henry,* supra, "There is no requirement that one primarily liable [defendant here] be a party to the Plaintiffs action as a prerequisite to an action for indemnity by one secondarily liable ... the only prerequisite appears to be that the entity from who indemnity is sought must have been 'fully and thoroughly informed of the claim and the pendency of the action and given full opportunity to defend or participate in the defense." *Henry,* supra at 423-24, citing the Ohio Supreme Court decision in *Maryland Cas. Co. v. Frederick,* supra.

CONCLUSION

For the reasons stated herein and based upon the authority presented, it is respectfully submitted that Defendant's motion should be denied.

Respectfully submitted,

/s/ Keith J. Watkins
Keith J. Watkins (0021888)
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Telephone: (419) 861-7800

Facsimile: (419) 861-7809
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

This undersigned certifies that a copy of the **Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings** was served on this 23rd day of January, 2006, to: John A. Fiocca, Jr., Esq. and Matthew J. Smith, Esq., 50 West Broad Street, Suite 3400, Columbus, OH 43215, attorneys for Defendant.

/s/ Keith J. Watkins
Keith J. Watkins

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Wagner-Meinert, Inc.,
Plaintiff,

Case No. 3:04CV7026

-vs-

Judge James G. Carr

EDA Controls Corp.,
Defendant.

FILED
December 13, 2005
Northern District
of Ohio,

MOTION OF DEFENDANT EDA CONTROLS CORP. FOR JUDGMENT ON THE PLEADINGS

NOW COMES Defendant, EDA Controls Corp. ("EDA"), by and through undersigned counsel, pursuant to Federal Civil Rule 12(c), and respectfully moves the Court for judgment on the pleadings, dismissing the Complaint, for the reasons set forth in the attached Memorandum in Support.

Respectfully submitted,
SMITH, ROLFES &
SKAVDAHL COMPANY, L.P.A.
/s/ John A. Fiocca, Jr.
Matthew J. Smith (0006788)
John A. Fiocca, Jr. (0022066)
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50 West Broad Street, Suite 3400

Columbus, Ohio 43215
Telephone: (614) 469-7130
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Attorneys for Defendant

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 16, 1999, a fire occurred at Frozen Specialties, Inc. ("FSI") in Archbold, Ohio, causing extensive damage to the facility. FSI commercially manufactures and processes frozen pizza. The fire is believed to have originated in a cheese cooler. The exact cause of the fire remains unknown. At that time, FSI was insured by the Atlantic Mutual Insurance Company. Under the terms of the policy, Atlantic Mutual paid FSI's fire loss claim in the amount of $12,744,126.93.

On June 15,2001, Atlantic Mutual, as subrogee of Frozen Specialties, Inc., filed suit against Wagner-Meinert, Inc., an Indiana corporation, in the United States District Court for the Northern District of Ohio, Western Division, Case No. 3:01 CV7302. The case was assigned to Judge David A. Katz. Wagner-Meinert is engaged in the business of manufacturing and supplying equipment and service related to various control systems, including systems for the detection of various gases, including ammonia. In its Complaint, Atlantic Mutual alleged

that prior to the fire, FSI had contracted with Wagner-Meinert to design, maintain, manage, and install an ammonia refrigeration system, which included an "ammonia detection system." Atlantic Mutual claimed the fire of was caused by ignition of ammonia, which had leaked into the cheese cooler. Atlantic Mutual further claimed Wagner-Meinert was actively negligent, and had breached its system maintenance contract with FSI.

Immediately prior to the March 29 2004 jury trial, Atlantic Mutual dismissed its negligence claims against Wagner-Meinert, and elected to proceed solely on the breach of contract claims. On April 8, 2004, the jury returned a verdict on two of the five breach of contract claims, in favor of plaintiff Atlantic Mutual. Judgment was entered April 9, 2004 in the sum of $2,500,000. Atlantic Mutual filed post-trial motions seeking, among other things, post-judgment interest. The motions were sustained, and final judgment entered in favor of Atlantic Mutual for $3,242,043.87. Subsequently, the parties settled the case for $3,000,000.

Two months before the case went to trial, Wagner-Meinert, Inc. filed this lawsuit on January 21,2004 against EDA Controls, Inc., an Ohio corporation. EDA was purchased in 1998 by PECO II, Inc. of Galion, Ohio. Aware that the Atlantic Mutual case was scheduled to be tried in April 2004, this Court stayed proceedings in this action pending conclusion of the Atlantic Mutual trial. In May 2005, the Court then reactivated this case.

Ostensibly, Wagner-Meinert's Complaint in this action sets forth claims against EDA for express and implied indemnification, and for statutory contribution among joint tortfeasors. The Complaint alleges that on May 22, 1995, Wagner-Meinert agreed in writing to purchase, and EDA agreed to sell, an ammonia detection system (a BM-3000-1 00 Controller, and accessories) for use in conjunction with an ammonia refrigeration system Wagner-Meinert had agreed to build and maintain at the FSI plant in Archbold. The contract price, $13,228, included a one-day, "onsite start-up" service option, valued at $600. The detection system was subsequently shipped, and installed, by

Wagner-Meinert at the Frozen Specialties factory in the summer of 1995. The on-site start-up service was conducted August 2, 1995, at the FSI plant.

The contract documents, as well as a copy of the original Atlantic Mutual Complaint against Wagner-Meinert, were attached to Plaintiff's Complaint in this case, and are part of the record.

Wagner-Meinert's Complaint against EDA sets forth six separate "Causes of Action." Careful review of these claims, however, suggests only three legal claims are actually being asserted: 1) express indemnification; 2) implied indemnification; and 3) contribution.

Based upon the law and argument set forth below, defendant EDA is entitled to judgment on the pleadings, for the following reasons:

1. The Wagner-Meinert/EDA contract (Complaint, Exhibits A and B) does not contain an indemnification clause and, as such, does not afford a basis for express indemnification.

2. Wagner-Meinert fails to state a legally cognizable claim for recovery against EDA based upon a theory of "implied indemnification." Wagner-Meinert was not found negligent in the underlying case and, as such, is not a "tortfeasor." Therefore, implied indemnification based upon

principles of active/passive negligence, has no application in this case.

3. Wagner-Meinert is not entitled to contribution among joint tortfeasors under Revised Code §2307.25, because neither Wagner-Meinert nor EDA is a "tortfeasor."

For the Court's convenience, a copy of the jury's verdict in the underlying action (*Atlantic Mutual v. Wagner-Meinert*), dated April 8, 2004, is appended hereto as Exhibit A. The Court's Judgment Entry of April 9, 2004, is appended as Exhibit B, and the Court's Final Judgment against Wagner-Meinert in the sum of $3,242,043.87 is appended hereto as Exhibit C.

II. STANDARD OF REVIEW

The standard of review applicable to a motion for judgment on the pleadings, under Federal Civil Rule 12(c) is the same de novo standard applicable to a motion to dismiss under Federal Civil Rule 12(b)(6). ***Mixon v. Ohio***, 193 F.3d 389, 399-400 (6th Cir. 1999). In reviewing the motion, the Court must construe the complaint in a light most favorable to the Plaintiff, accept all of the complaint's factual allegations as true, and determine whether Plaintiff

can prove any set of facts in support of the claim that would entitle plaintiff to relief.

IV. LAW AND ARGUMENT

Based upon the allegations contained in the Complaint, on or about May 22, 1995, EDA Controls, Inc. and Wagner-Meinert, Inc., entered into a contract for the sale and purchase of an ammonia detection system, a tangible good, for the sum of $13,228. The purchase price included a $600 "on-site start-up service" option. The contract was fully executed prior to September 1, 1995. The system was delivered, the start-up service option completed on August 2, 1995, and the purchase price paid.

Because this transaction is primarily one for the sale of goods, it is governed by the sales provisions of the Uniform Commercial Code, incorporated in Ohio Revised Code, Chapter 1302. Article Two of the Uniform Commercial Code applies to transactions involving the sale of goods, and does not apply to service contracts. In determining the applicability of Article Two sales provisions, Ohio courts have applied the "predominant purpose" test:

> ... the test for inclusion in or the exclusion from (R.C. Chapter 1302.01) sales provisions is whether the predominant factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved. ***Allied Indus. Servo Corp. v. Kasle Iron & Metals*** (1977),62 Ohio App.2d 144.

The contract proposal submitted by EDA in this case (appended to Plaintiff's Complaint as Exhibit A), in the amount of $13,228, indicates ninety-five percent (95%), or $12,628, of the total contract price represented payment for the sale of a tangible good, i.e. the ammonia detection system. The only "service" included in this transaction was the "on-site start-up service," valued at $600. Clearly, this contract is predominantly one for the sale of goods, not services, and the provisions of the Uniform Commercial Code apply.

Based upon the factual allegations contained in the Complaint, Wagner-Meinert, Inc. had contracted with Frozen Specialties, Inc., prior to May 22, 1995, to install a new refrigeration system at the

FSI plant in Archbold, Ohio. Presumably, that contract included an obligation requiring Wagner-Meinert to install and maintain the refrigeration system, including the ammonia detection system. Following the on-site start-up service performed by EDA's representative on August 2, 1995 at the FSI plant, EDA had no other contact with FSI or its Archbold plant.

As noted in the Introduction, Wagner-Meinert has set forth six separate "counts" in its Complaint against EDA. These "Counts" are not labeled or otherwise described. However, they appear to set forth only three legal claims, based upon theories of express indemnification, implied indemnification, and statutory contribution, under Ohio Revised Code §2307.25. Each "count" will be addressed separately.

A. PLAINTIFF'S "FIRST CAUSE OF ACTION."

Plaintiff's first cause of action is set forth at Paragraphs 18-24. At Paragraph 22, Plaintiff claims EDA breached its express written contract with Wagner-Meinert. However, at Paragraph 24, Plaintiff

claims EDA " ... has a duty to fully indemnify Plaintiff for any such judgment, pursuant to the parties' express agreement." This wording is unfortunate. It is unclear whether Plaintiff is claiming "breach of contract," or invoking the remedy of express contractual indemnification. EDA suspects Plaintiff intended to assert the latter, rather than the former. Regardless, Plaintiff cannot prevail on either claim.

If Wagner-Meinert intended to assert a claim for breach of contract, the claim is barred by the four-year statute of limitations set forth in R.C. §1302.98 (UCC 2-725):

> A. An action for breach of contract for sale must be commenced within four years after the cause of action has accrued ...
>
> B. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach ...

In this case, the contract was fully executed no later than September 1, 1995. Wagner-Meinert's claim, set forth at Paragraph 21 of the Complaint that EDA

"supplied defective equipment" is, therefore, time barred.

Alternatively, if Wagner-Meinert intended to assert a claim for express contractual indemnification, the contract documents do not include any indemnification provision. As such, the Complaint fails to state a legally cognizable claim for express contractual indemnification.

B. PLAINTIFF'S "SECOND CAUSE OF ACTION."

Plaintiff's second cause of action is set forth at Paragraphs 25-31. At Paragraph 26, Wagner-Meinert alleges the parties had an "implied contract," relating to the sale of goods. Plaintiff claims, at Paragraph 29, that EDA breached this "implied contract," thereby entitling Plaintiff to "indemnification," for any judgment rendered against Wagner-Meinert by FSI's subrogee, Atlantic Mutual, in the underlying case.

Based upon the exhibits attached to Plaintiff's Complaint, the contract in this case is "express," not "implied." Again, it is unclear whether Plaintiff is claiming "breach of contract," or asserting a right of

"indemnification." If Wagner-Meinert intended to plead the latter, the "indemnification" referred to in Paragraph 31, can only relate to a theory of "implied indemnification," since there is no express indemnification clause contained in the written contract.

> Principles of implied indemnification, under Ohio law, are inapplicable in this case. Implied indemnification has been defined by the Ohio Supreme Court, as follows:
> Where a person is chargeable with another's wrongful act and pays damages to the injured party as a result thereof, he has a right of indemnity from the person committing the wrongful act, the party paying the damages being only secondarily liable; whereas the person committing the wrongful act is primarily liable. ***Travelers Indemnity Co. v. Trowbridge*** (1975),41 Ohio St.2d 11.

See, also, ***Comer v. Risko***, 106 Ohio St.3d 185, 2005-Ohio-4559, decided September 14, 2005.

Under Ohio law, "implied indemnification" necessarily involves an analysis of active/passive negligence, or primary/secondary liability:

> Indemnity is the right of a party whose negligence is passive and who is only secondarily liable to recover from the party who is primarily liable through active negligence or actual knowledge of a dangerous situation and acquiescence in the continuance thereof for complete reimbursement of all proper expenditures paid to a third party injured through the violation of their common duties. ***Lattea v. Akron*** (1982), 9 Ohio App.3d 118, at Paragraph 4 of the Syllabus.

See, also, ***Whitney v. Horrigan*** (1996), 112 Ohio App.3d 511; ***Mahathiraj v. Columbia Gas of Ohio, Inc.*** (1992), 84 Ohio App.3d 554; ***Wells v. Spirit Fabricating, Ltd.*** (1996), 113 Ohio App.3d 282.

In the underlying case, Atlantic Mutual dismissed its negligence claims against Wagner-Meinert, Inc., prior to trial. The jury returned a verdict in favor of Atlantic Mutual, against Wagner-Meinert, Inc., for breach of contract, as reflected by the subsequent Judgment Entry, entered by the Court. As such, Wagner-Meinert, Inc. is not a tortfeasor, because it was never found to be negligent, either actively or passively.

By asserting a theory of "implied indemnification," Wagner-Meinert is claiming, essentially, that its negligence proximately resulted in injury and damage to FSI, but that such negligence was secondary and passive to the active and primary negligence of EDA Controls Corp. Wagner-Meinert cannot make such a claim in this case, because Wagner- Meinert was not found negligent. Therefore, the theory of "implied indemnification" is unavailable.

C. PLAINTIFF'S "THIRD CAUSE OF ACTION."

In its "third cause of action," Wagner-Meinert alleges that, in the underlying case, Atlantic Mutual claimed EDA "manufactured and supplied defective equipment." (Complaint, Paragraph 34.) This is incorrect. EDA is not even mentioned in Atlantic Mutual's complaint against Wagner-Meinert. (Complaint, Exhibit C.) At Paragraph 35, Wagner-Meinert alleges it " ... sold and delivered defective equipment to Frozen Specialties," and as such, EDA has an obligation to "indemnify"

Wagner-Meinert, " ... in an amount equal to any judgment rendered against" Wagner-Meinert in the underlying case.

Plaintiff's third cause of action makes little sense. At Paragraph 33, Plaintiff suggests EDA breached an implied warranty of fitness for a particular use under the Uniform Commercial Code. For the reasons stated above, such a claim would be time barred. Alternatively, at Paragraph 38, Wagner-Meinert appears to be making another claim for implied indemnification, based upon principles of active/passive negligence. Again, Wagner-Meinert was not found liable for negligence, and as such, principles of implied indemnification are inapplicable.

D. PLAINTIFF'S "FOURTH CAUSE OF ACTION."

The gravamen of Plaintiff's fourth cause of action (Complaint, Paragraphs 39-43) appears to set forth claims for indemnification and contribution:

> 43. Should Plaintiff herein be found liable to Atlantic Mutual Insurance Company in the matter

> captioned *Atlantic Mutual Insurance Company v. Wagner-Meinert*, Case No. 3:01 CV7302, Defendant has an obligation to **indemnify** Plaintiff or contribute to any judgment rendered against Plaintiff herein. (Complaint, Paragraph 43.)

For the reasons previously articulated, the Complaint does not set forth legally cognizable claims for express or implied indemnification.

Plaintiff's fourth cause of action also introduces the theory of contribution among joint tortfeasors under Ohio Revised Code section 2307.25:

> A. Except as otherwise provided in sections 2307.25 to 2307.28 of the Revised Code, if one or more persons are jointly and severally liable **in tort** for the same injury or loss to person or property or for the same wrongful death, there may be a right of contribution, even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a **tortfeasor** who has paid more than that **tortfeasor's** proportionate share of the common liability, and that **tortfeasor's** total recovery is limited to the amount paid by that **tortfeasor** in excess of that

> **tortfeasor's** proportionate share. No **tortfeasor** may be compelled to make contribution beyond that **tortfeasor's** own proportionate share of the common liability. There is no right of contribution in favor of any **tortfeasor** against whom an intentional tort claim has been alleged and established.
>
> B. A **tortfeasor** who enters into a settlement with a claimant is not entitled to contribution from another **tortfeasor** whose liability for injury or loss to person or property or the wrongful death is not extinguished by the settlement, or in respect to any amount paid in a settlement that is in excess of what is reasonable. (Emphasis added.)

In the underlying lawsuit, Wagner-Meinert was not determined to be a "tortfeasor." Therefore, R.C. §2307.25 is inapplicable.

E. PLAINTIFF'S "FIFTH CAUSE OF ACTION."

Plaintiff's fifth cause of action, set forth at Paragraphs 45-49, is redundant. At Paragraph 49, Plaintiff states:

49. Pursuant to R.C. §2307.25, Defendant has an obligation to indemnify Plaintiff or contribute to any judgment rendered against it in the above-captioned Atlantic Mutual matter.

For the reasons set forth in the preceding section, Wagner-Meinert may not recover in either express of implied indemnification, or in statutory contribution under Ohio law.

F. PLAINTIFF'S "SIXTH CAUSE OF ACTION."

Plaintiff's sixth cause of action is set forth at Paragraphs 50-54. Again, this claim is redundant.

> 54. Should Plaintiff herein be found liable to Atlantic Mutual in the matter captioned *Atlantic Mutual Insurance Company v. Wagner-Meinert*, Case No. 3:01 CV7302, Defendant has an obligation to indemnify Plaintiff or contribute to any judgment rendered against Plaintiff.

Once again, Plaintiff asserts a claim for indemnification (express or implied), and for contribution. For the reasons set forth above, these legal claims are unavailable to Plaintiff in this case.

Any issue regarding exactly what Plaintiff intended to plead in its Complaint, however, should be resolved by the language contained in the Complaint's Prayer:

> WHEREFORE, Plaintiff respectfully requests that this Court find that Plaintiff is entitled to indemnification and/or contribution from the Defendant for any judgment obtained against Plaintiff in the case of Atlantic Mutual Insurance Company v. Wagner-Meinert, Case No. 3:01 CV7302, currently pending in the United States District Court for the Northern District of Ohio ...

Based upon this language, it does appear Wagner-Meinert did, in fact, intend to assert the indemnification and contribution claims discussed above.

In this case, Wagner-Meinert's Complaint must be dismissed, as a matter of law, because the facts, as alleged, do not articulate cognizable legal claims. The written contract, appended to the Complaint, does not contain an indemnification

clause, thereby eliminating Plaintiff's claim for express indemnification. And because Wagner-Meinert was never adjudicated negligent at trial, Wagner-Meinert is not a tortfeasor, and cannot recover under Ohio principles of either implied indemnification law, or principles of contribution under Ohio Revised Code §2307.25.

For these reasons, Defendant EDA Controls Corp. requests its Motion for Judgment on the Pleadings be sustained, and the case dismissed, at Plaintiff's costs.

Respectfully submitted,

SMITH, ROLFES & SKAVDAHL COMPANY, L.P.A.

/s/ John A. Fiocca, Jr.
Matthew J. Smith (0006788)
John A. Fiocca, Jr. (0022066)
LeVeque Tower
50 West Broad Street, Suite 3400
Columbus, Ohio 43215
Telephone: (614) 469-7130
Fax: (614) 469-7146
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2005, a copy of the foregoing was filed electronically. Notice of the filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

Andrew J. Ayers, Esq. Via electronic mail only
Lisa M. Johnson Lodato, Esq.
BAHRET & ASSOCIATES CO., L.PA
7050 Spring Meadows West Drive
Holland, Ohio 43528
aayers@bahret-law.com
ljohnson@jones-bahret.com

/s/ John A. Fiocca, Jr.
John A. Fiocca, Jr. (0022066)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Wagner-Meinert, Inc.,
Plaintiff,

Case No. 3:04CV7026

-vs-

Judge James G. Carr

EDA Controls Corp.,
Defendant.

FILED
March 19, 2004
Northern District
of Ohio,
Clerk

ANSWER OF DEFENDANT, EDA CONTROLS CORP., TO PLAINTIFF'S COMPLAINT

NOW COMES the Defendant, EDA Controls Corp., by and through undersigned counsel, and for its Answer to the Complaint:

FIRST DEFENSE

1. For want of knowledge, denies the allegations contained in Paragraphs 1, 3, 4, 6, 7, 8, 9, 10, 19, 20, 21, 22, 23, 26, 29, 30, and 36 of Plaintiff's Complaint.

2. Admits the allegations contained in Paragraphs 2, 14 and 15 of Plaintiff's Complaint.

3. Admits that Defendant has sold products to Plaintiff. but denies the remaining allegations contained in Paragraph 12 of Plaintiff's Complaint.

4. Admits that on June 16, 1999, a fire occurred at Frozen Specialties, Inc., but denies, for want of knowledge, the remaining allegations contained in Paragraph 13 of Plaintiff's Complaint.

5. Denies the allegations contained in Paragraphs 24, 28, 31, 35, 37, 38, 40, 41, 42, 43, 45, 46, 47, 48, 49, 51, 52, 53, and 54 of Plaintiff's Complaint

6. Denies each and every other allegation contained in Plaintiff's Complaint not specifically admitted herein to be true.

SECOND DEFENSE

7. The injuries or damages suffered by Plaintiff were caused by the superseding and intervening acts of parties or entities other than this answering Defendant, thus barring in whole or in part, any claims for judgment against this Defendant.

THIRD DEFENSE

8. The Plaintiff's own conduct, whether characterized as comparative negligence, contributory negligence, or assumption of the risk, caused, or contributed to cause, Plaintiff's injuries and damages, and that any recovery is barred or reduced thereby.

FOURTH DEFENSE

9. Plaintiff has failed to join necessary parties, pursuant to Rule 19.

FIFTH DEFENSE

10. The Complaint fails to state a cause of action, against this answering Defendant upon which relief may be granted.

SIXTH DEFENSE

11. Plaintiff's claims are barred by the doctrine of laches.

SEVENTH DEFENSE

12. Plaintiff's claims are barred by the doctrine of waiver and estoppel.

EIGHTH DEFENSE

13. Plaintiff's claims are barred by the doctrine of release.

NINTH DEFENSE

14. Plaintiff's claims are barred by the applicable statute of limitations.

WHEREFORE, having fully answered the Complaint, Defendant EDA Controls Corp. demands the Complaint against it be dismissed in its entirety and that Defendant be reimbursed for its costs incurred herein. including reasonable attorney's fees.

Respectfully submitted,

SMITH, ROLFES &. SKAVDAHL COMPANY, L.P.A.

Matthew J. Smith
John A. Fiocca,
LeVequeTower
50 West Broad Street, Suite 3400
Columbus. Ohio 43215
Telephone: (614) 469-7130
Fax: (614) 469-7146
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify the foregoing Answer of Defendant was served 10n the below listed individuals by ordinary U.S. Mail, postage prepaid on March 16, 2004:

Andrew J. Ayers, Esq.
Lisa M. Johnson Lodato, Esq.
BAHRET & ASSOCIATES CO., L.P.A.
7050 Spring Meadows West Drive
Holland, Ohio 43528

/s/ John A. Fiocca, Jr.
John A. Fiocca, Jr. (0022066)

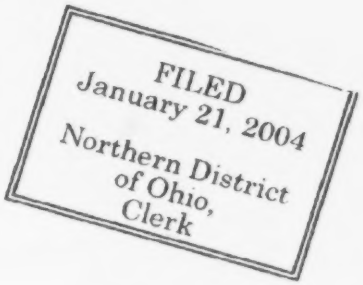
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Wagner- Meinert, Inc.
7617 Freedom Way
Fort Wayne, IN 46818,
Plaintiff,

Case No. 3:04CV7026

Judge James G. Carr

v.



EDA Controls Corp.
c/o Michael N. Forrest,
Statutory Agent for Service
of Process
7020 A Huntley Road
Columbus, OH 43229,
Defendant.

COMPLAINT

Andrew J. Ayers (0022334)
Lisa M. Johnson Lodato (0074774)
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7050 Spring Meadows West Drive
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Telephone: (419) 861-7800
Facsimile: (419) 861-7808
Attorneys for Plaintiff Wagner-Meinert, Inc.

Now comes Plaintiff, Wagner-Meinert, Inc., by and through counsel, Andrew J. Ayers of Bahret & Associates Co., L.P.A., and for its complaint against Defendant, EDA Controls, states as follows:

1. Plaintiff, Wagner-Meinert, Inc., is an Indiana corporation with its principal place of business located at 7617 Freedom Way, Fort Wayne, Indiana, at all times relevant to the allegations contained herein.

2. EDA Controls Corp. was incorporated pursuant to the laws and regulations of the State of Ohio on June 19, 1985, but has since been merged out of existence as of December 31, 1999 by the purchase in whole or in part of its assets and liabilities by PECO II, Inc., an Ohio Corporation. Plaintiff lacks sufficient information at this time to know the extent of the responsibility of PECO II, Inc. for the liabilities of EDA Controls, Inc. Upon completing discovery on that issue, plaintiff may seek to join PECO II, Inc. as a party. While in business, the principal place of business for EDA Controls was 7020 A Huntley Road, Columbus, OH 43229.

3. This court has jurisdiction of the present matter pursuant to 28 USC § 1332 based upon diversity of the parties.

4. All events giving rise to the causes of action alleged herein occurred in Archbold, Fulton County, Ohio.

FACTUAL ALLEGATIONS

5. Plaintiff incorporates all previous allegations as if fully rewritten herein.

6. During its existence, Defendant was in the business of manufacturing and supplying equipment and services related to various control systems, including systems for the detection of various gases, including ammonia.

7. On or about February 15, 1995, Plaintiff, by and through its agents and/ or employees, contacted Defendant, by and through its agents and/ or employees, and requested that Defendant provide Plaintiff with a quote for the design, manufacture, installation and end user training of an ammonia detection system to be

installed at Frozen Specialties, Inc. in Archbold, Fulton County, Ohio.

8. On or about May 22, 1995, Defendant responded to Plaintiff's inquiry, and provided a written quote to Plaintiff. (Exhibit A)

9. As detailed in the quote, Defendant offered to design the system, manufacture or acquire its component parts, provide on-site installation of the system and train the end user of the system in its operation in exchange for payment from Plaintiff.

10. Plaintiff accepted Defendant's offer and purchased the equipment and services from Defendant according to the terms provided in Defendant's quote.

11. Plaintiff accepted Defendant's offer in a writing sent to Defendant. (Exhibit B)

12. Plaintiff purchased said services and equipment from Defendant for the purpose of utilizing same in connection with a control system Plaintiff was hired to install for a third-party at a facility located in Archbold, Ohio.

13. On June 16, 1999, a fire occurred at Frozen Specialties, Inc. AT or about the same time, an ammonia release occurred at Frozen Specialties. It has been alleged by Frozen Specialties's insurer that the ammonia detection system failed to detect the ammonia release. It has furt' er been alleged that EDA Controls failed to fulfill its agreement with Plaintiff in that the system provided did not contain a fail-safe mode and failed to provide sufficient notification of alarms. It has also been alleged that EDA Controls failed to properly train the Frozen Specialties' employees in the operation and maintenance if the system resulting in the failure of the system to detect the ammonia release. It is alleged that the ammonia released provided a secondary fuel for the fire, causing the damage from the fire to be substantially worse than it should have been.

14. As a result, Plaintiff has been named as a defendant in a lawsuit pending in the United States District Court for the Northern District of Ohio, Case No. 3:01CV7302, captioned Atlantic

Mutual Insurance Co. v. Wagner Meinert, Inc. A copy of the complaint is attached hereto. (Exhibit C)

15. In that case, Plaintiff therein, Atlantic Mutual Insurance Co., alleges that it has paid damages to its insured in the amount of twelve million, seven-hundred forty-four thousand, one-hundred twelve dollars and ninety-three cents ($12,744,126.93) resulting from the fire at Frozen Specialties.

FIRST CAUSE OF ACTION

18. Plaintiff incorporates all of its previous allegations as if fully rewritten herein.

19. Plaintiff and Defendant formed an express contract which required Defendant to provide specific services and manufacture and supply equipment fit for its intended use, in exchange for payment for same from Plaintiff.

20. Plaintiff fully performed its obligations under said contract.

21. However, it is alleged by Atlantic Mutual that Defendant failed to provide said services

and furthermore manufactured and supplied defective equipment.

22. If Atlantic Mutual's allegations are proven, Defendant breached the parties' express agreement.

23. As a result of Defendant's alleged breach, Plaintiff may have to pay damages to Atlantic Mutual.

24. Should Plaintiff be found liable in the above-mentioned Atlantic Mutual lawsuit, Defendant has a duty to fully indemnify Plaintiff from any such judgment, pursuant to the parties' express agreement.

SECOND CAUSE OF ACTION

25. Plaintiff incorporates all previous allegations as if fully rewritten herein.

26. Plaintiff and Defendant are parties to an implied contract whereby Defendant agreed to provide services and manufacture and supply equipment fit for its intended purpose, in exchange for payment for same from Plaintiff.

27. Plaintiff fully performed all of its obligations under said implied contract.

28. However, Atlantic Mutual alleges that Defendant failed to provide said services and furthermore manufactured and supplied defective equipment.

29. Should Atlantic Mutual's allegations be proven, Defendant's actions constitute a breach of the parties' agreement.

30. As a result of Defendant's alleged breach, Plaintiff may have to pay damages to Atlantic Mutual.

31. Should Plaintiff be found liable in the above-mentioned Atlantic Mutual lawsuit, Defendant has a duty to fully indemnify Plaintiff from any such judgment, pursuant to the parties' implied agreement.

THIRD CAUSE OF ACTION

32. Plaintiff incorporates all previous allegations as if fully rewritten herein.

33. Pursuant to an implied and/or express agreement formed by Plaintiff and Defendant,

Defendant agreed to manufacture and supply certain equipment that was fit for its intended use.

34. Instead, Atlantic Mutual alleges that Defendant manufactured and supplied defective equipment.

35. Subsequently, Plaintiff sold and delivered said defective equipment to frozen Specialties.

36. As a result, Plaintiff has been named as a defendant in the aforementioned lawsuit, Atlantic Mutual Insurance Co. v. Wagner-Meinert.

37. The plaintiff in Atlantic Mutual alleges that it suffered damage resulting from the defectively manufactured equipment. (Exhibit C)

38. Should Plaintiff herein be found liable to Atlantic Mutual Insurance Co., Defendant, a manufacturer, has a duty to fully indemnify Plaintiff, a supplier of Defendant's defectively manufactured equipment, in an amount equal to any judgment rendered in the aforementioned case.

FOURTH CAUSE OF ACTION

39. Plaintiff incorporates all previous allegations as if fully rewritten herein.

40. Pursuant to an express and/or implied agreement formed by Plaintiff and Defendant, Defendant had a duty to manufacture and supply equipment and provide services to Plaintiff, in accordance with the terms of said agreement.

41. Atlantic Mutual alleges that Defendant breached this duty by failing to perform its obligations under the contract.

42. Specifically, it is alleged that Defendant failed to provide said services as agreed, and further manufactured and supplied defective equipment, not fit for its intended use, in breach of the parties' agreement.

43. Should Plaintiff herein be found liable to Atlantic Mutual Insurance Co. in the matter captioned Atlantic Mutual Insurance Co. v. Wagner-Meinert, Case No. 3:01CV7302, Defendant has an obligation to indemnify Plaintiff or contribute to any judgment rendered against Plaintiff herein.

FIFTH CAUSE OF ACTION

44. Plaintiff incorporates all previous allegations as if fully rewritten herein.

45. Pursuant to an express and/or implied agreement formed by Plaintiff and Defendant, Defendant had a duty to manufacture and supply equipment and provide services to Plaintiff, in accordance with the terms of said agreement.

46. Atlantic Mutual alleges that Defendant breached this duty by failing to perform its obligations under the contract.

47. Specifically, it is alleged that Defendant failed to provide said services as agreed, and further manufactured and supplied defective equipment, not fit for its intended use, in breach of the parties' agreement.

48. Should Plaintiff herein be found liable to Atlantic Mutual Insurance Co. in the matter captioned Atlantic Mutual Insurance Co. v. Wagner-Meinert, Case No. 3:01CV7302, Defendant has an obligation to contribute to any judgment rendered against Plaintiff herein.

49. Pursuant to R.C. Section 2307.25, Defendant has an obligation to indemnify Plaintiff or contribute to any judgment rendered against it in the above-captioned Atlantic Mutual matter. (R.C. §2307.25, attached hereto as Exhibit D.)

SIXTH CAUSE OF ACTION

50. Plaintiff incorporates all previous allegations as if fully rewritten herein.

51. Defendant had an express and/or implied duty to provide Plaintiff with services and equipment described in its quote. (Exhibit A)

52. Atlantic Mutual alleges that Defendant negligently failed to provide said services and equipment.

53. Specifically, Atlantic Mutual alleges that Defendant failed to provide said services as agreed, and further manufactured and supplied defective equipment, not fit for its intended use, contrary to the parties' agreement.

54. Should Plaintiff herein be found liable to Atlantic Mutual Insurance Co. in the matter captioned Atlantic Mutual Insurance Co. v.

Wagner-Meinert, Case No. 3:01CV7302, Defendant has an obligation to indemnify Plaintiff or contribute to any judgment rendered against Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this court find that Plaintiff is entitled to indemnification and/ or contribution from Defendant for any judgment obtained against Plaintiff in the case of Atlantic Mutual Insurance Co. v. Wagner-Meinert, Case No. 3:01CV 7302, currently pending in the United States District Court for the Northern District of Ohio, and further find that Plaintiff herein is entitled to attorneys fees and costs incurred in connection with the present matter and any other relief which this court deems equitable and just.

Respectfully submitted,

/s/ Lisa M. Johnson Lodato
Andrew J. Ayers
Lisa M. Johnson Lodato
Attorneys for Plaintiff
Wagner-Meinert, Inc.

EDA CONTROLS CORP

5/22/95

Fax Message Cover Sheet

TO:	DENNIS MIENERT
Company:	Wagnert Mienert
Address:	7617 Freadom Way
Location:	Fort Wayne IN 46818
Phone:	219-489-7655
Fax:	219-489-7473
FROM:	LARRY ANTHONY
Company:	EDA Controls Corporation
Address:	7020 Huntley Road
Location:	Columbus, Ohio 43229
Phone:	614-431-0694
Fax:	614-431-1668
Date:	5/22/95
Pages including this cover page:	

EDA CONTROLS CORP.

Message:

Dear Mr. Mienert,
Attached is the updated quotation you requested. Do not hesitate to call if you have any questions.

Regards
Larry Anthony

Dear Mr. Mienert,

Enclosed is the updated quotation for the Ammonia gas monitoring system that we discussed today.

I have included 20 LED alarm lights mounted to the BM-3000 front panel. These will light when an alarm occurs from that channel. To have this configuration you must acid Two (2) additional D0-500 cards. You will have a total of four relay outputs for external alarm, two of these relays will be ratted for 117 VAC interface. The HOA-500 has been eliminated. Based on our conversation I believe you will only need Three (3) AI-500 cards (24 Input Channels) not the four as on the original quote.

The Type C sensor provides the detection method for monitoring Ammonia gas in the 30-300 ppm range, tin oxide non specific sensors are used. These units provide a 4-20 MA output and are inputted to the AI-500 cards: in the BM-3000 controller system. The AS-200-C are temperature compensated and will provide stable results if temperatures swing over a wide range. They also are usable in low temperature applications where the sensors are located in temperatures below -10 Deg. F.

As a option we have quoted our On Site Start Up Service, we will provide on site checkout to insure the system is functioning properly and train the end user customer on system operation.

Please do not hesitate to call if you have any questions regarding this quotation. We appreciate your continued interest in EDA Controls Corporation.

Very Truly Yours,
Larry Anthony

7020 Huntley Road Columbus, Ohio 43229
614-431-0694 Fax 614-431.0668

EDA CONTROLS CORP

5/22/95

This Quotation prepared for: Quoatation#174A5225

Name Mr. Dennis Mienert
Reference Our 2/15/95 phone conversation
Company Wagner Mienert
Address 7617 Freadom Way
Fort Wayne IN 46818
Phone # 219-489-7555
Fax # 219-489-7473

	Part Number	Description	Each	Total
1	BM-3000-100	One shelf controller	$1475	1,475
3	AI-500	Analog Input card, (24 inputs) from	546	1,638
		AS-200-C Ammonia Sensors		
3	DO-500	Digital Output cards (24 relay outputs)	280	840
1	DI-500	Digital Input Cards (8 switch inputs)	250	250

17	AS-200-C	Ammonia Sensor Transmitter 4-20 MA out	305	5,185
		Range: 30-300ppm		
1	AS-200-VLA	Ventline Ammonia Sensor Transmitter	440	440
		Range 125-3,000 ppm		
1	Cabinet	Larger cabinet & wiring includes:	900	900
	36H x 30W x 10	36x30x10 inch nema 1 enclosure		
	w/mtg tabs	12&24 VAC Transformers		
		All input terminals, wired to entrelec high		
		destiny terminals for easier wiring		

20		Alarm LED lights located on front panel	15	300
		with ID Identificatio n Plates: Lights		
		connected to DO-500 Relay outputs		
2		117 VAC Rerlay SPDT for Customer use	n/c	n/c
1		Wiring schedule "customer wiring"	n/c	n/c
1	FSS4	Workstation software	500	500
1	ULDL	Upload and Simulation software	500	500
1	MODEM	2400 Baud phone modem	150	150
1	Pgm costs	Programmin g Costs		450

1	Day	On site Start up Assistance*	600	600
		*Plus Travel and Expenses		
	Total			$13,228

Delivery: 30 Days ARO
Prices are Dealer Cost
FOB: EDA Controls Corp. Columbus Ohio
Quote Valid: 60 Days See Terms & Conditions

7020 Huntley Road Columbus, Ohio 43229
614-431-0094 Fax 614-431-0668

WAGNER-MEINERT Inc.
Engineers· Contractors
7617 Freedom Way
Fort Wayne, Indiana 46818
Phone 219-489-7555 Fax 219-489-7473

PURCHASE ORDER 9110

☒ Equipment
☐ Subcontractor
☐ Miscellaneous

TO: EDA CONTROLS CORP. 7020 HUNTLEY ROAD COLUMBUS, OHIO 43229				SHIP TO: WAGNER-MEINERT, INC.	
PHONE 614 431 0694		FAX 614 431 0668		TAG:	
DATE ORDER 5-23-95	SHIP TO ARRIVE 6-26-95	SHIP VIA:	TERMS:	JOB # 5072	JOB NAME FSI-AMMONIA DETECTION
PLEASE ENTER OUR ORDER FOR THE FOLLOWING TO BE SHIPPED AS DIRECTED					
QTY ORDERED	QTY RECEIVED	DESCRIPTION		UNIT PRICE	AMOUNT
1		BM-3000-100 CONTROLLER AND ACCESSORIES AS PER YOUR QUOTE# 174A 5225 WITH TRAVEL AND EXPENSES AS NEEDED IN ADDITION TO BASE QUOTE			
					13228.00

⊠Provide_6_ Copies of submittals and drawings by_____	⊠Provide _6_ sets of operations, maintenance and installation manuals, warranty papers & spare parts lists by_____	In accordance with Federal, State and Local Right to Know and Hazardous Communication Standards, Seller is hereby requested to furnish to Buyer any and all Material Safety Data Sheets (MSDS's) that may be applicable to the products and or services covered by this Purchase Order/Subcontract. All materials must meet OSHA requirements
□48 Hours notice required for delivery. Contact_____	□This order is tax exempt. Tax I.D. 0004817893	

CONDITIONS GOODS ARE SUBJECT TO OUR INSPECTION AND APPROVAL. IF SHIPMENT WILL BE DELAYED FOR ANY REASON, ADVISE US IMMEDIATELY, STATING ALL THE NECESSARY FACTS. TO AVOID ERRORS, NOTE SPECIFICATIONS CAREFULLY AND IF UNABLE TO COMPLETE ORDERS AS WRITTEN NOTIFY US PROMPTLY	BY DENNIS D. MEINERT Purchasing Agent

This order is subject to terms and specifications described hereon and on reverse side.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

ATLANTIC MUTUAL
INSURANCE COMPANY,
as subrogee of FROZEN
SPECIALITIES, INC.,
Plaintiff,
-VS.-
WAGNER-MEINERT INC.
7617 Freedom Way
Fort Wayne, IN 46818
Defendant.

Case No. 3:01CV7302
Judge David A. Katz

COMPLAINT AND JURY DEMAND

Todd B. Denenberg (P42024)
Paul B. Hines (P47328)
Gary R. Chopp (P33181)
GROTEFELD & DENENBERG, L.L.C.
30800 Telegraph, Suite 3858
Bingham Farms, MI 48025
PH: (248) 727-7100

Michael J. Manahan (0021297)
MANAHAN, PIETRYKOWSKI,
BAMMAN & DELANEY
414 North Erie Street
Toledo, Ohio 43603
PH: (419) 243-6148
FAX: (419) 241-7759

****

THERE IS NO OTHER FILE IN THIS COURT OTHER CIVIL ACTIONS

BETWEEN THESE PARTIES OR OTHER PARTIES ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE AS ALLEGED IN THE COMPLAINT.

NOW COMES Plaintiff Atlantic Mutual Insurance Company, by and through its attorneys, GROTEFELD & DENENBERG, L.L.C., and MANAHAN, PIETRYKOWSKI, BAMMAN & DELANEY and for and as its COMPLAINT AND JURY DEMAND, states as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiff, Atlantic Mutual Insurance Company ("Atlantic"), is a New York corporation with its principal place of business in New York, New York at all times relevant to the incident complained of herein.
2. Frozen Specialties, Inc ("FSI") is a Delaware corporation with its principal place of business at 720 Barre Road, Archbold, Ohio at all times relevant to the incident complained of herein.
3. FSI is in the business of manufacturing, processing and selling frozen pizzas.

4. Defendant Wagner-Meinert Inc. ("WMI") is an Indiana corporation with its principal place of business at 7617 Freedom Way, Fort Wayne, Indiana at all times relevant to the incident complained of herein.

5. WMI is in the business of designing, building, and servicing industrial refrigeration systems.

6. WMI transacts business systematically and continuously within the State of Ohio.

7. The amount in controversy exceeds Seventy-Five Thousand ($75,000.000) Dollars.

8. Jurisdiction in this matter is based upon diversity jurisdiction under the laws and Constitution of the United States, pursuant to 28 USC § 1332.

9. All incidents complained of in this complaint arise in Archbold, Fulton County, Ohio.

FACTUAL ALLEGATIONS

10. Plaintiffs incorporate by reference paragraphs 1 through 9 of their Complaint as though fully set forth herein.

11. Prior to June 15, 1999, Atlantic issued a policy of property insurance to FSI, providing business interruption coverage as well as property insurance coverage for FSI's real and personal property, located at 720 Barre Road, Archbold, Ohio.

12. Prior to June 15, 1999, FSI contracted with WMI for WMI to design, maintain, manage, oversee, and control FSI's ammonia refrigeration system, including its ammonia detection system, and WMI designed, maintained, managed, oversaw, and controlled FSI's ammonia refrigeration system, including its ammonia detection system.

13. FSI relied upon WMI for the design, maintenance, management, oversight, and control FSI's ammonia refrigeration system, including its ammonia detection system.

14. Prior to June 15, 1999, FSI contracted with WMI for the preparation and implementation of a Process Safety Management program.

15. FSI relied upon WMI for the preparation and implementation of a Process Safety Management program, including the training of employees.

16. Prior to June 15, 1999, FSI contracted WMI to conduct a Process Hazard Analysis of the ammonia refrigeration system as required by the Federal Government.

17. FSI relied upon WMI to conduct a Process Hazard Analysis of the ammonia refrigeration system as required by the Federal Government, and WMI conducted such an analysis.

18. Prior to June 15, 1999, FSI purchased ammonia detectors from WMI, and WMI advised FSI as to the recommended location and placement of the detectors in FSI's facility .

19. On or about June 15, 1999, FSI's ammonia refrigeration system developed a leak, and Anhydrous Ammonia was released into the Cheese Cooler and other parts of FSI' s facility in Archbold, Ohio, endangering the safety of persons and property.

20. On or about June 15, 1999, a spark ignited the ammonia which had leaked into the Cheese Cooler, and the large resulting fire damaged FSI's real property, personal business property, and caused a significant loss of business income.

21. As a result of the fire, FSI presented claims to Atlantic, and Atlantic was obligated to pay, and did pay to date, the sum of TWELVE MILLION, SEVEN HUNDRED FORTY-FOUR THOUSAND, ONE HUNDRED TWENTY-SIX DOLLARS AND NINETY-THREE CENTS ($12,744,126.93) which was due and owning under the policy.

22. Upon such payments and under the terms and conditions of the policy, and by operation of law, Plaintiff Atlantic is subrogated to the rights, claims and causes of action of its insured against Defendant in the amount of TWELVE MILLION, SEVEN HUNDRED FORTY -FOUR THOUSAND, ONE HUNDRED TWENTY-SIX DOLLARS AND NINETY-THREE CENTS ($12,744,126.93).

COUNT 1 - BREACH OF CONTRACT

23. Atlantic hereby incorporates by reference paragraphs 1 through 22 as if fully stated herein.

24. WMI owed FSI a duty to act with reasonable care and as a reasonably prudent designer, builder, and service provider for FSI's ammonia

refrigeration system and ammonia detection system in performing its contractual obligations to FSI.

25. WMI breached the aforementioned duties and obligations in several respects including, but not limited to, the following:

a. WMI failed to replace or warn of the need for replacement of outdated, obsolete equipment, including the evaporator in the Cheese Cooler.

b. WMI failed to perform maintenance which WMI was authorized to perform and expected to perform at will and as it saw fit.

c. WMI failed to design and construct an adequate mechanism to shut down the flow of ammonia in the event of a significant ammonia leak.

d. WMI failed to adequately and safely maintain the ammonia refrigeration system.

e. WMI failed to establish a safe procedure for the defrosting of the ammonia refrigeration system.

f. WMI failed to adequately locate and position ammonia detectors throughout FSI's facility.

g. WMI removed one or more ammonia detectors from FSI's facility which would have detected the ammonia leak which caused the fire.

h. WMI failed to maintain and calibrate the ammonia detectors, which if properly maintained and calibrated, would have detected the ammonia leak which caused the fire.

i. WMI failed to test the ammonia detection system, including the individual detectors, and failed to ensure the system and its detectors were in good working order.

j. In conducting the Process Hazard Analysis, WMI failed to identify the need for an adequate and safe response procedure in the event of an ammonia leak, including identifying potential failure modes and/or effects and providing for effective mitigation.

k. WMI failed to develop adequate standard operating procedures and adequate emergency response procedures to ensure adequate and safe response in the event of an ammonia leak.

l. WMI failed to establish an adequate Mechanical Integrity Program which addressed the ammonia detection system.

m. In conducting the Process Hazard Analysis, WMI failed to evaluate the potential failure of the ammonia detection system as required by federal regulation, including identifying potential failure modes and/or effects and providing for effective mitigation.

n. WMI failed to adequately train FSI employees concerning all aspects of the FSI ammonia refrigeration and detection systems, including the following:

(1) the need for calibration of the ammonia detectors.

(2) the need for preventative maintenance at the FSI facility.

(3) the need for the proper defrosting of the ammonia refrigeration system.

o. WMI failed to adequately warn FSI employees concerning all aspects of the FSI ammonia refrigeration and detection systems, including the following:

(1) the dangers of an ammonia leak to persons and property

(2) the danger or likelihood of a fire caused by the ignition of Anhydrous Ammonia.

(3) the Process Hazard Analysis was inadequate

(4) the standard operating procedures and emergency response procedures were inadequate

(5) the Mechanical Integrity Program was inadequate

(6) the inoperable ammonia detectors and ammonia detection system

(7) the absence of ammonia detectors

26. As a direct result of FSI's breach of the contract, Atlantic sustained losses and damages as alleged

herein, and FSI' s breach was a direct and proximate cause of said losses.

WHEREFORE, Atlantic respectfully requests this honorable Court to enter judgement against WMI in the amount of TWELVE MILLION, SEVEN HUNDRED FORTY-FOUR THOUSAND, ONE HUNDRED TWENTY-SIX DOLLARS AND NINETY-THREE CENTS ($12,744,126.93), together with interest, costs, and attorneys fees.

COUNT II - NEGLIGENCE AND/OR GROSS NEGLIGENCE

27. Atlantic hereby incorporates by reference paragraphs 1 through 26 as if fully stated herein.

28. WMI owed FSI a duty to act with reasonable care and as a reasonably prudent designer, builder, and service provider for industrial refrigeration systems.

29. WMI breached the aforementioned duty in several respects.

30. WMI breached that duty by committing negligence and/or gross negligence which includes, but is not limited to, the following particulars:

a. WMI failed to replace or warn of the need for replacement of outdated, obsolete equipment, including the evaporator in the Cheese Cooler.

b. WMI failed to perform maintenance which WMI was authorized to perform and expected to perform at will and as it saw fit.

c. WMI failed to design and construct an adequate mechanism to shut down the flow of ammonia in the event of a significant ammonia leak.

d. WMI failed to adequately and safely maintain the ammonia refrigeration system.

e. WMI failed to establish a safe procedure for the defrosting of the ammonia refrigeration system.

f WMI failed to adequately locate and position ammonia detectors throughout FSI's facility.

g. WMI removed one or more ammonia detectors from FSI's facility which would

have detected the ammonia leak which caused the fire.

h. WMI failed to maintain and calibrate the ammonia detectors, which if properly maintained and calibrated, would have detected the ammonia leak which caused the fire.

i. WMI failed to test the ammonia detection system, including the individual detectors, and failed to ensure the system and its detectors were in good working order.

j. In conducting the Process Hazard Analysis, WMI failed to identify the need for an adequate and safe response procedure in the event of an ammonia leak, including identifying potential failure modes and/or effects and providing for effective mitigation.

k. WMI failed to develop adequate standard operating procedures and adequate emergency response procedures to ensure adequate and safe response in the event of an ammonia leak.

l. WMI failed to establish an adequate Mechanical Integrity Program which addressed the ammonia detection system.

m. In conducting the Process Hazard Analysis, WMI failed to evaluate the potential failure of the ammonia detection system as required by federal regulation, including identifying potential failure modes and/or effects and providing for effective mitigation.

n. WMI failed to adequately train FSI employees concerning all aspects of the FSI ammonia refrigeration and detection systems, including the following:

(1) the need for calibration of the ammonia detectors.

(2) the need for preventative maintenance at the FSI facility.

(3) the need for the proper defrosting of the ammonia refrigeration system.

o. WMI failed to adequately warn FSI employees concerning all aspects of the FSI ammonia refrigeration and detection systems, including the following:

(1) the dangers of an ammonia leak to persons and property

(2) the danger or likelihood of a fire caused by the ignition of Anhydrous Ammonia.

(3) the Process Hazard Analysis was inadequate

(4) the standard operating procedures and emergency response procedures were inadequate

(5) the Mechanical Integrity Program was inadequate

(6) the inoperable ammonia detectors and ammonia detection system

(7) the absence of ammonia detectors

31. As a direct and proximate result of WMI's negligence and/or gross negligence, set forth above, Atlantic sustained losses and damages as alleged herein, and WMI's negligence and/or gross negligence was a direct and proximate cause of said losses.

WHEREFORE, Atlantic respectfully requests this honorable Court to enter judgement against WMI in the amount of TWELVE MILLION, SEVEN

HUNDRED FORTY-FOUR THOUSAND, ONE HUNDRED TWENTY-SIX DOLLARS AND NINETY-THREE CENTS ($12,744,126.93), together with interest, costs, and attorneys fees.

COUNT III - NEGLIGENT MISREPRESENTATION

32. Atlantic hereby incorporates by reference paragraphs 1 through 31 as if fully stated herein.

33. WMI falsely represented that it would maintain and manage the ammonia refrigeration system and the ammonia detection system in the FSI facility in a reasonable, prudent, safe, and workmanlike manner.

34. WMI failed to maintain and manage the ammonia refrigeration system and the ammonia detection system in the FSI facility in a reasonable, prudent, safe, and workmanlike manner.

35. FSI relied upon WMI's misrepresentations regarding the maintenance and management of the ammonia refrigeration system and the ammonia detection system

36. FSI justifiably relied upon the misrepresentations of WMI to the detriment of FSI.

37. As a direct and proximate result of FSI's detrimental reliance upon WMI's misrepresentations, Atlantic sustained losses and damages as alleged herein, and WMI's misrepresentations were a direct and proximate cause of said losses.

WHEREFORE, Atlantic respectfully requests this honorable Court to enter judgement against WMI in the amount of TWELVE MILLION, SEVEN HUNDRED FORTY-FOUR THOUSAND, ONE HUNDRED TWENTY-SIX DOLLARS AND NINETY-THREE CENTS ($12,744,126.93), together with interest, costs, and attorneys fees.

COUNT IV - ABSOLUTE AND/OR QUALIFIED NUISANCE

38. Atlantic hereby incorporates by reference paragraphs 1 through 37 as if fully stated herein.

39. By designing, maintaining, managing, overseeing, and controlling FSI's ammonia refrigeration system, including its ammonia

detection system, WMI created an absolute and/or qualified nuisance.

40. The designing, maintaining, managing, overseeing, and controlling FSI's ammonia refrigeration system, including its ammonia detection system, was so extraordinarily hazardous that it imposed an absolute duty upon WMI to protect FSI from any and all harm.

41. WMI is strictly liable for any and all harm suffered as a result of its designing, maintaining, managing, overseeing, and controlling FSI's ammonia refrigeration system, including its ammonia detection system.

42. The designing, maintaining, managing, overseeing, and controlling FSI's ammonia refrigeration system, including its ammonia detection system, was so inherently dangerous that WMI is strictly responsible for the escape of any ammonia from FSI's ammonia refrigeration system.

43. The consequences of WMI's designing, maintaining, managing, overseeing, and controlling FSI's ammonia refrigeration system, including its ammonia detection system, resulted

in an invasion of a FSI's legally protected property interests.

44. The consequences of WMI's designing, maintaining, managing, overseeing, and controlling FSI's ammonia refrigeration system, including its ammonia detection system, resulted in an unreasonable interference with the FSI's use and enjoyment of its property.

45. As a direct and proximate result of WMI's absolute and/or qualified nuisance, set forth above, Atlantic sustained losses and damages as alleged herein, and WMI's nuisance was a direct and proximate cause of said losses.

WHEREFORE, Atlantic respectfully requests this honorable Court to enter judgement against WMI in the amount of TWELVE MILLION, SEVEN HUNDRED FORTY-FOUR THOUSAND, ONE HUNDRED TWENTY-SIX DOLLARS AND NINETY-THREE CENTS ($12,744,126.93), together with interest, costs, and attorneys fees.

Respectfully submitted,

GROTEFELD & DENENBERG, L.L.C.

By: /s/ Gary R. Chopp
TODD B. ENENBERG (P 42024)

PAUL B. HINES (P 47328)
GARY R. CHOPP (P 33181)
30800 Telegraph, Suite
3858 Bingham Farms, MI 48025
(248) 727-7100

MANAHAN, PIETRYKOWSKI,
BAMMAN & DELANEY

By: /s/ Michael J. Manahan
MICHAEL J. MANAHAN (0021297)
414 North Erie Street
Toledo, Ohio 43603
(419) 243-6148

Dated: June 5, 2001

JURY DEMAND

NOW COMES Plaintiff Atlantic Mutual Insurance Company, by and through its attorneys, GROTEFELD & DENENBERG, L.L.C., and MANAHAN, PIETRYKOWSKI, BAMMAN & DELANEY and hereby demand trial by jury as to all issues so triable as of right herein.

/s/ Gary R. Chopp
TODD B. DENENBERG (P42024)
PAUL B. HINES (P47328)
GARY R. CHOPP (P33181)
/s/ Michael J. Manahan
MICHAEL J. MANAHAN
(0021297)

2305.06 Contract in writing.

Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

Effective Date: 07-01-1993

2305.07 Contract not in writing - statutory liability.

Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall he brought within six years after the cause thereof accrued.

Effective Date: 07-01-1993

§ 1302.98
Statutes & Session Law
TITLE [13] XIII COMMERCIAL TRANSACTIONS - OHIO UNIFORM COMMERCIAL CODE
CHAPTER 1302: SALES
1302.98 Statute of limitations in contracts for sale - UCC 2-725.

1302.98 Statute of limitations in contracts for sale - UCC 2-725.

(A) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(B) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

(C) Where an action commenced within the time limited by division (A) of this section is so terminated as to leave available a remedy by another action for the same breach, such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(D) This section does not alter sections 2305.15 and 2305.16 of the Revised Code on tolling of the statute of limitations, nor does it apply to causes of action which have accrued before July 1, 1962.

Effective Date: 07-01-1962

§ 2307.25
Statutes & Session Law
TITLE [23] XXIII COURTS - COMMON PLEAS
CHAPTER 2307: CIVIL ACTIONS
2307.25 Right of contribution.

2307.25 Right of contribution.

(A) Except as otherwise provided in sections 2307.25 to 2307.28 of the Revised Code, if one or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor's proportionate share of the common liability, and that tortfeasor's total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor's proportionate share. No tortfeasor may be compelled to make contribution beyond that tortfeasor's own proponionate share of the common liability. There is no right of contribution in favor of any tortfeasor

against whom an intentional tort claim has been alleged and established.

(B) A tortfeasor who enters into a settlement with a claimant is not entitled to contribution from another tortfeasor whose liability for the injury or loss to person or property or the wrongful death is not extinguished by the settlement, or in respect to any amount paid in a settlement that is in excess of what is reasonable.

(C) A liability insurer that by payment bas discharged in full or in part the liability of a tortfeasor and has discharged in full by the payment its obligation as insurer is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's proponionate share of the common liability. This division does not limit or impair any right of subrogation arising from any other relationship.

(D). This section does not impair any right of indemnity under existing law. If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not

contribution. and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation.

(E) This section does not apply to breaches of trust or of other fiduciary obligations.

(F) The proportionate shares of tortfeasors in the common liability shall be based upon their relative degrees of legal responsibility. If equity requires the collective liability of some as a group, the group shall constitute a single share. and principles of equity applicable to contribution generally shall apply.

(G) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or loss to person or property or for the same wrongful death, contribution may be enforced by separate action.

(H) Whenever the provisions of the "Federal Tort Claims Act,11 60 Stat. 842 (1946), 28 D.S.C. 2671 et seq., are applicable to a ton and the United States is held liable in tort, the United States has no right of contribution under this section against the

state pursuant to the waiver of sovereign immunity contained in Chapter 2743. of the Revised Code.
Effective Date: 04-09-2003

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No. 07-632

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

WAGNER-MEINERT, INC.,

Petitioner,

v.

EDA CONTROLS CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Petitioner has presented compelling reasons for this Court to grant the writ of certiorari sought?

2. Whether the Sixth Circuit Court of Appeals correctly upheld and affirmed the judgment of the U.S. District Court for the Northern District of Ohio, Western Division, in dismissing Petitioner's Complaint, pursuant to Fed. R. Civ. P. 12(c)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent EDA Controls Corp. hereby advises the Court that:

(1) EDA Controls Corp., an Ohio corporation, no longer exists. The company's assets and liabilities were ultimately transferred to PECO II, Inc. of Galion, Ohio, a publicly held corporation. PECO II, Inc., has no parent company and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

Prior to May 22, 1995, Petitioner Wagner-Meinert, Inc. ("WMI") an Indiana corporation, contracted with Frozen Specialties, Inc. ("FSI"), a manufacturer, processor, and distributor of frozen pizzas, to design, build and maintain a new refrigeration system at FSI's facility in Archbold, Ohio. Concomitantly, WMI contracted with Respondent EDA Controls Corp. ("EDA") for the design and sale of certain equipment (an "ammonia detection system") to be incorporated into the refrigeration system designed and constructed by WMI at the FSI facility.

On May 22, 1995, EDA and WMI entered into a written contract for the sale and purchase of the ammonia detection system, a tangible good, for the sum of $13,228.00. This price included a one-day, $600.00, "On-Site Start-Up Service" option. WMI attached a copy of this written contract to the Complaint as Exhibits A and B.[1] (App. H1-H21) In relevant part, the contract provided:

> As a [*sic*] option we have quoted our On-Site Start-Up Service. We will provide on-site check-out to insure the system is functioning properly, and train the end-user customer on system operation.

EDA delivered the ammonia detection system to the FSI facility, pursuant to the contract, on or before June

---

[1] All references to the Appendix in this brief refer to Petitioner's Appendix in its Petition for Writ of Certiorari.

26, 1995. (App. H20) The one-day, on-site start-up service option was conducted on August 2, 1995. Nearly four years later, on June 16, 1999, a fire of unknown origin occurred at FSI, causing fire damage to the FSI facility in the amount of $12,744,126.93. (App. H4-H5) At the time of the fire, FSI was insured under a policy of property insurance issued by Atlantic Mutual Insurance Company, which paid the fire loss, thereby acceding to FSI's rights. On June 15, 2001, Atlantic Mutual filed a subrogation action against WMI in the United States District Court for the Northern District of Ohio, Western Division, Case No. 3:01CV7302. (App. H22) EDA was not included as a party-defendant, nor was EDA impleaded as a third-party defendant by WMI. The case was assigned to Judge David A. Katz.

The Complaint filed by Atlantic Mutual asserted claims against WMI in tort and breach of contract. However, immediately prior to the jury trial on March 29, 2004, Atlantic Mutual dismissed the tort claims against WMI. On April 8, 2004, the jury returned a verdict in favor of Atlantic Mutual on two of the five breach of contract claims, and awarded contract damages against WMI in the amount of $2,500,000.00. The parties subsequently compromised a dispute regarding the pre-judgment interest issue, and the case was settled for $3,000,000.00. (App. B3-B4)

Three months prior to the Atlantic Mutual/WMI trial, on January 21, 2004, WMI filed the instant lawsuit against EDA. (App. H1) The case was assigned to District Court Chief Judge James G. Carr, who stayed further proceedings pending resolution of the underlying Atlantic Mutual/WMI litigation. Upon conclusion of that

trial, Judge Carr reactivated this lawsuit. Upon reactivation, EDA filed its Motion for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12(c), on December 13, 2005. (App. F1) On April 12, 2006, Judge Carr sustained the motion. (App. C1-C10; D1)

Petitioner appealed to the United States Sixth Circuit Court of Appeals. The case was briefed, and the decision of the U.S. District Court was affirmed on February 23, 2007. (App. B1-B9) Petitioner filed a Petition for Rehearing, and the Petition was denied on July 30, 2007. (App. A1) WMI filed its Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on October 25, 2007.

MISSTATEMENTS OF FACT AND LAW IN THE PETITION FOR WRIT OF CERTIORARI

Supreme Court Rule 15.2 requires a respondent to "address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." The petition filed by WMI in this case asks this Court, in part, to "clarify" whether ". . . the 'predominant factor test,' as applied in commercial (UCC) mixed contracts, may be decided by the court as a matter of law, or is an 'issue of fact' to be determined by a jury." However, as Respondent argued in the Courts below, the predominant purpose test is a non-issue in this case, and did not need to be considered by the lower Courts.

If writ of certiorari is granted in this case, the single issue for this Court's determination is whether the District Court properly sustained Respondent's Motion

for Judgment on the Pleadings, filed pursuant to Fed. R. Civ. P. 12(c). Respondent filed the motion because the Complaint filed by Petitioner failed to assert a legally cognizable claim upon which relief could be granted.

The Complaint (App. H1-H39) asserts, ostensibly, six separate legal claims: 1) breach of express written contract; 2) breach of express oral contract; 3) breach of implied contract; 4) express indemnification; 5) implied indemnification, based upon principles of active/passive negligence; and 6) statutory contribution, pursuant to O.R.C. §2307.25. However, examination of these claims, *in light of the relief sought*, effectively eliminates five of these claims from further consideration.

While the Complaint *appears* to articulate six separate legal claims, the Complaint actually asserts only a *single* claim for indemnification: Petitioner seeks complete reimbursement of the jury award against WMI for breach of contract and in favor of Atlantic Mutual in the companion litigation. Alternatively stated, the Respondent does *not* seek damages for negligence or breach of contract. Rather, Petitioner is seeking full indemnification from the Respondent for the jury award. This conclusion is based upon the specific language contained in *each* of the six "Counts" asserted in the Complaint: ". . . should WMI be found liable to Atlantic Mutual in the original lawsuit, *EDA must fully indemnify WMI from any such resulting judgment.*" (Emphasis added).

It is apparent from this language WMI does not seek to recover damages for breach of contract (which, incidentally, would be limited to recovery of the contract

price of $13,228 under Ohio law). Nor does WMI seek damages for common law negligence or breach of an implied warranty (which would be barred by the applicable Ohio statute of limitations relating to those torts). Rather, WMI wants EDA to fully reimburse WMI for the $3,000,000 it was required, by jury verdict, to pay to Atlantic Mutual at trial. This is not a claim for "damages" devolving from breach of contract or negligence, but a claim for "indemnification."

There is nothing contained in the pleadings to suggest, nor has Petitioner argued, that WMI is entitled to indemnification pursuant to an *express* indemnification clause in the sales contract between WMI and EDA. Indeed, the parties agree their contract did not contain an express indemnification clause. Consequently, the only remaining cause of action available under Ohio law permitting WMI to secure "complete reimbursement" from EDA, under these circumstances, is a claim for "*implied* indemnification." Under Ohio law, "implied indemnification" is defined as the right of a party secondarily liable in tort (or passively negligent), to obtain complete reimbursement from another tortfeasor who is primarily liable in tort (or actively negligent).

Applying principles of Ohio common law, the District Court below correctly held an implied contract for indemnity exists *only* within the context of a relationship wherein one party is found to be vicariously liable for the acts of a tortfeasor. However, the trial court also noted, correctly, that the relationship between WMI and

EDA was one of contracting parties, *not one of related tortfeasors*:

> Wagner-Meinert was not found vicariously liable for EDA's actions. It paid Atlantic damages after a jury found it breached a contract with FSI. (App. C8-C9)

For these reasons, it was unnecessary for the District Court and the Court of Appeals to even consider Petitioner's "breach of contract" claim in the first place. In fact, all issues relating to the "nature" of the WMI/EDA contract, and the proper statute of limitations to be applied to that contract, were irrelevant, and did not need to be addressed by the lower Courts at all. The only issue which *should* have been considered was whether WMI was entitled to indemnification based upon principles of active/passive negligence or primary/secondary tort liability under Ohio law.

Thus, Petitioner has mischaracterized the ". . . issue which would properly be before the Court if certiorari were granted." If certiorari is granted, the issue before the Court should be expressed as follows:

> Whether a plaintiff seeking complete reimbursement from a defendant of a jury award in favor of a third party for breach of contract, has stated a cognizable claim for implied indemnification under Ohio law, where the relationship between plaintiff and defendant is one of contracting parties, and not related tortfeasors?

Although Respondent raised this argument previously, the lower courts apparently decided to give Petitioner's Complaint the "benefit of the doubt," and construed the Complaint as though Petitioner was actually seeking contract damages, rather than indemnification. Even under a "breach of contract" analysis, however, the lower Courts correctly analyzed the contract issue, and correctly sustained Respondent's motion for judgment on the pleadings on that basis. However, if a writ were to issue in this case, the issue on appeal should not involve whether the six or fifteen year statute of limitations applicable to Ohio contracts would apply, or how the predominant purpose test should be applied, as suggested by Petitioner. Based upon the nature of the relief sought in the Complaint, the only issue for this Court's consideration is whether a non-tortfeasor can maintain an action for complete reimbursement of a jury award for breach of contract, under a theory of implied indemnification in tort, under Ohio law.

REASONS FOR DENYING THE PETITION

There are several compelling reasons why certiorari should not be granted. In this case, the Petition fails to satisfy *any* of this Court's criterion for a grant of certiorari, as specified in Supreme Court Rule 10.

I.

THE DECISION OF THE SIXTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY DECISION OF ANY OTHER COURT OF APPEALS.

The decision of the Sixth Circuit below does not conflict with any decision of this Court or any decision of any other Court of Appeals. Accordingly, the Petition does not provide a sufficient basis for granting a writ of certiorari. *See, e.g., Wisniewski v. United States*, 353 U.S. 901, 902 (1954); *Davis v. United States*, 417 U.S. 333, 340 (1974) (where there was recognition that ordinarily, even an intra-circuit conflict or a conflict between decisions rendered by different panels of the same court is not a sufficient basis for granting a writ of certiorari). Here, there is no conflict of any kind.

II.

THE SIXTH CIRCUIT'S DECISION WAS CORRECTLY DECIDED.

The decision of the Court of Appeals, below, which affirmed the decision of the United States District Court for the Northern District of Ohio, sustaining Respondent's Motion for Judgment on the Pleadings, was correctly decided. Historically, this Court has held that it is not "a court for correction of errors in fact finding" and "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Also see

Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *United States v. Doe*, 465 U.S. 605 (1984). In the present case, there is no error below, much less a "very obvious and exceptional show of error," which would merit the grant of certiorari.

For the reasons articulated at Pages 4-8, above, it was unnecessary for the District Court and the Court of Appeals to consider WMI's arguments relating to its contract and negligence claims because WMI was not really seeking contract or negligence damages. Rather, WMI sought complete reimbursement of a jury award based upon a theory of implied indemnification under Ohio common law. However, the lower Courts elected to construe the Complaint broadly, and considered Respondent's Motion for Judgment on the Pleadings as if WMI had actually asserted negligence and contract claims in the Complaint. The lower Courts then correctly applied Ohio law principles pertaining to commercial contracts, correctly analyzed the issues presented, and correctly sustained Respondent's Fed. R. Civ. P. 12(c) motion. Specifically, the District Court determined the breach of contract claim was barred by the four-year statute of limitations for contracts relating to the sale of goods under O.R.C. § 1302.98(A). (An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued.) Wagner-Meinert disagreed and, on appeal, claimed the underlying contract was primarily one for services, not subject to the UCC four-year statute of limitations, but subject to the fifteen-year statute of limitations for written contracts generally.

Both the District Court and the Sixth Circuit concluded the WMI/EDA contract should be characterized as one for the sale of a good, i.e., a contract for the sale of the "ammonia detection system," a tangible good. The Courts also identified the "contract" in this case as the written contract for the sale of the ammonia detection system the Petitioner attached to its Complaint in this case as Exhibits "A" and "B" (*i.e.*, the "offer," and the "acceptance," respectively). Because the $13,228 contract price included a $600, one-day, On-Site Start-Up Assistance *option*, the contract was correctly characterized as a "mixed" contract:

> In a mixed contract for goods and services, the test for inclusion or exclusion under section 1302.98 with its four-year statute of limitations is "whether the predominant factor and purpose of the contract is the rendition of service, with goods incidentally involved, or whether the contract is for the sale of goods, with labor incidentally involved." Court of Appeals Opinion, Page B-6 (App. B1-B9).

The District Court, then, correctly applied the "predominant purpose test" to this mixed contract, and concluded, as a matter of law, the contract was one primarily relating to the sale of a good.

The Sixth Circuit agreed, noting there existed no factual dispute as to the nature of the sales contract at issue, and that it was "proper for the District Court to rule as a matter of law on the nature of the contract and to determine that the four-year statute was applicable." Court of Appeals Opinion at B6. (App. B1-B9) For this

reason, both the District Court and the Court of Appeals determined the applicable statute of limitations with respect to the contract for the sale of the ammonia detection system expired in 1999, four years after execution of the sales contract in 1995, thereby barring Petitioner's claim for breach of contract which may have been alleged in the Complaint.

Petitioner objects to this ruling, and seeks writ of certiorari for two reasons: 1) the lower courts misapplied Fed. R. Civ. P. 12(c) by not construing the allegations set forth in the Complaint most favorably in WMI's favor; and 2) the lower courts misapplied Ohio law by failing to hold that the application of the "predominant purpose test" to mixed contracts in commercial sales transactions must, in all cases, be determined by the jury as a matter of fact, rather than by the court, as a matter of law. Respondent will address each argument separately.

A. Contrary To Petitioner's Assertion, An Allegation In A Complaint That An Oral Contract *May* Exist Which *Might* Afford A Basis For Recovery Does Not Preclude An Award For Judgment On The Pleadings Under Fed. R. Civ. P. 12(c).

Neither Respondent, nor the lower Courts in this case, disagrees with Petitioner's observation that when considering a Fed R. Civ. P. 12(c) motion, the trial court is obliged to construe the allegations contained in a complaint most strongly in plaintiff's favor. The District Court did so in this case. Although Petitioner acknowledges the existence of an express, written contract for the sale of the ammonia detection system and the one-day *optional* start-up service (WMI attached

the written agreement to the Complaint as an exhibit), Petitioner argues that the Complaint also refers to the possible existence of "other" contracts, such as "oral" contracts, or "implied" contracts between the parties which, depending upon their terms, may have provided a basis for imposing liability for indemnification upon EDA in this case. As such, WMI argues it should have been permitted to conduct discovery for the purpose of determining whether such oral contracts "existed" and, if they did exist, discover the terms of those contracts.

While the Complaint makes oblique reference to possible "oral" or "implied" agreements, the Complaint does not allege *any* of the material terms attendant to those agreements including the subject matter of the contracts, the terms of the contracts, or the consideration for the contracts. Nevertheless, Petitioner argues that because the Complaint refers to the *possible* existence of additional oral contracts between the parties, the grant of judgment on the pleadings was improper and Petitioner should have been afforded the opportunity to conduct discovery for the purpose of: 1) identifying those oral contracts, 2) identifying the material terms contained in such contracts, and 3) determining whether the material terms in those oral contracts *might* have afforded WMI some basis for recovery against EDA.

The argument is unsupportable under Ohio law. First, WMI's Complaint did not contain either direct or inferential allegations respecting all of the material elements to sustain a recovery under some viable legal theory. The absence of those allegations, is fatal. As observed by the Sixth District Court of Appeals in

Scheid v. Fanny Farmer Candy Shops, 859 F.2d 434 (1988):

> Although this standard for Rule 12(b)(6) dismissals is quite liberal, more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements. 5 C. Wright & A. Miller, Federal Practice & Procedure § 1357 at 596 (1969). **"In practice, 'a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.'"** *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (quoting *In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed*, 462 U.S. 1125, 103 S. Ct. [*437] 3100, 77 L. Ed. 2d 1358 (1983)), *cert. denied*, 470 U.S. 1054, [**6] 105 S. Ct. 1758, 84 L. Ed. 2d 821 (1985); *see also Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984); 5 C. Wright & A. Miller, Federal Practice & Procedure § 1216 at 121-23 (1969). As the First Circuit stated, "we are not holding the pleader to an impossibly high standard; we recognize the policies behind rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) *cert. denied*,

431 U.S. 914, 97 S. Ct. 2173, 53 L. Ed. 2d 223 (1977). *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436-437. (Emphasis added.)

WMI's Complaint does not allege any of the "material elements" necessary to support a claim for breach of oral contract, other than identifying EDA and WMI as the parties to the verbal contract. Nor does the Complaint identify any material elements of the oral agreement not otherwise contained in the written contract which Petitioner now appears to claim, in its Petition for Writ, is not a written contract at all! Instead, WMI simply argues an oral contract *may* have existed, and that such a contract *may* have contained additional material terms not included in the written contract document Petitioner appended to the Complaint. This is insufficient and, as a consequence, WMI's claim for "breach of oral contract" cannot succeed, on the basis of *Scheid, supra.*

The "possible oral contract" claim is barred for a second reason: By alleging breach of contemporaneous written and oral agreements dealing with the same sales transaction, Wagner-Meinert is, in effect, asking the Court to rewrite the agreement between the parties. This argument, however, is barred on the basis of Ohio's parol evidence rule.

In *Glazer v. Lehman Brothers, Inc.*, 394 F.3d 444 (2005), the U.S. Sixth Circuit Court of Appeals discussed Ohio's parol evidence rule in detail. In doing so, the Court

relied, in part, upon the Ohio Supreme Court's decision in *Galmish v. Cicchini*, 90 Ohio St.3d 22 (2000):

> The parol evidence rule, as construed by Ohio courts, states "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 2000 Ohio 7, 734 N.E.2d 782, 788 (Ohio 2000) (citing 11 Williston on Contracts 569-70, § 33.4 (4 Ed. 1999)). Thus, absent fraud, mistake or some other invalidating cause, prior or contemporaneous oral agreements may not be used to alter, contradict, contest, or vary an integrated written agreement. *Galmish*, at 788. Contrary to its name, this rule is one of substantive contractual, not evidentiary, law. *Id.*, *Glazer*, at 455.

Where a written contract exists, extrinsic evidence must be excluded as a matter of substantive Ohio contract law, because such evidence cannot ". . . serve to prove what the agreement was, this being determined as a matter of law to be the writing itself." *Galmish* at 789.

> The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, oral or written, are excluded; or, as it is sometimes

> said, the written memorial supersedes these prior or contemporaneous negotiations. *Id.* at 788-89 (citation omitted); accord *Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607, 612 (6th Cir. 2001) (citing *Galmish* and stating "the parol evidence rule does not operate to prohibit proof of terms of the agreement; instead, it provides that parol terms are not terms of the agreement at all"). The principle policy behind the rule is to protect the integrity and purpose of written agreements. *Galmish*, at 789 (citation omitted).

Therefore, to the extent Petitioner's argument that Respondent's Motion for Judgment on the Pleadings was improvidently granted because the lower Courts failed to consider Respondent's potential liability under unspecified oral agreements alleged in the Complaint, the argument cannot succeed. The Courts properly considered the only contract before them, *i.e.*, the written agreement appended to the Complaint filed in this case. In doing so, the lower Courts correctly construed the Complaint in light of the requirements set forth in Fed. R. Civ. P. 12(c), and properly dismissed the Complaint for failing to set forth a legally cognizable claim upon which relief could be granted.

B. Where The Service Portion Of A Mixed Contract Constitutes Less Than Five Percent Of The Contract Price, The Lower Courts Properly Determined, As A Matter Of Law, That The Contract Was Primarily One Involving The Sale Of Goods, Rather Than The Sale Of Services.

In its Petition, WMI urges adoption of a universal rule in connection with the administration of the "predominant purpose test" applied to "mixed contracts" in commercial sales transactions. Specifically, Petitioner requests the Court to hold that the "predominant purpose test" should only be applied to mixed contracts by the jury or trier of fact, and not by the trial court "as a matter of law." The invitation to adopt such a rule should be declined.

Petitioner's brief fails to cite a single decision holding that a trial court is not permitted to apply the "predominant purpose test" as a matter of law, to determine whether the contract reviewed is one "primarily for the sale of goods," or one "primarily for the sale of services." There *is* authority, however, for the proposition that whether the "predominant purpose test" should be administered by the court, or by the trier of fact, depends upon whether "reasonable minds could reach different conclusions as to whether the contract was predominantly a goods transaction or predominantly a service transaction." *C.G. Mahan Constr. Co. v. Valspar Corp.*, 30 Fed. Appx. 381 (6th Cir. Feb. 11, 2002).

In this case, the "service" portion of the contract (*i.e.*, the $600 one-day start-up service *option*) was less than five percent of the $13,228 contract price. It is difficult

to imagine how "reasonable minds" would not conclude that the primary purpose of this contract was anything other than a contract for the sale of goods. By definition, the one-day, start-up service was an "*option*," clearly ancillary to the contract for the sale of the ammonia detection system itself.

In response, WMI argues the underlying Complaint alludes to the possible existence of collateral "oral" and/or "implied" contracts which *may* have required EDA to perform "services" *other* than those articulated in the written contract attached to the Complaint. Once again, in the absence of any specific allegations contained in the Complaint articulating the material terms of these elusive verbal agreements, the argument does not persuade. *Scheid, supra.*

The Sixth Circuit correctly affirmed the District Court's decision to sustain Respondent's Motion for Judgment on the Pleadings, filed pursuant to Fed. R. Civ. P. 12(c). The District Court was not obliged to consider the possible effect of verbal contracts not specifically articulated in the Complaint, upon the Petitioner's "breach of contract" claim. The District Court was obliged to consider only the issues raised in the Complaint with respect to the written contract appended to it.

III.

THE CASE DOES NOT INVOLVE IMPORTANT ISSUES OF LAW.

This case does not involve any important statutory or constitutional issues, state or federal, which merits review by this Court. The case involves routine disposition of a motion for judgment on the pleadings filed under Fed. R. Civ. P. 12(c). As such, the case is an unappealing candidate for review, since even the presence of admittedly "serious legal questions" is generally not sufficient for the grant of certiorari. *English v. Cunningham*, 361 U.S. 905, 904 (1969).

IV.

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS BELOW TURNED UPON AN ANALYSIS OF THE PARTICULAR FACTS INVOLVED IN THE CASE.

The decision of the Sixth Circuit Court of Appeals turned upon the fact-bound application of settled state law and an analysis of the particular facts involved. These facts include the following: (a) the Complaint alleges the existence of a written contract for the sale and purchase of an ammonia detection system, valued at $13,228. The contract price included a one-day, initial start-up service option, valued at $600; (b) a copy of the written contract was appended to the Complaint, as Exhibit A (offer), and Exhibit B (acceptance); (c) the Complaint fails to articulate the material terms sufficient to establish the existence of an oral or implied contract between the

parties; and (d) the Complaint does not allege, nor does the procedural history of the underlying case suggest, that Wagner-Meinert was liable *in tort* for the fire which occurred at Frozen Specialties, Inc. on June 16, 1999. As such, Petitioner would not be entitled to recover against Respondent, as a matter of Ohio law, for either implied indemnification or statutory contribution among joint tortfeasors.

This Court generally denies certiorari when review is sought of a lower court decision which turns upon an analysis of the particular facts involved. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Also see *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

V.

THIS IS NOT AN APPROPRIATE CASE FOR REVIEW BY THIS COURT.

Petitioner seeks review of the lower courts' decision to sustain Respondent's Motion for Judgment on the Pleadings, on the basis that Fed. R. Civ. P. 12(c) was "misapplied." Specifically, Petitioner disagrees with the lower courts' conclusions regarding whether the Complaint articulated a claim for breach of an oral contract. Petitioner claims to seek review because this Court can provide "guidance" to "courts throughout the country" for the purpose of ". . . determining when and under what circumstances a judgment on the pleadings should be rendered." However, what the Petitioner really wants, of course, is a different result.

WMI's invitation for Supreme Court review of the Motion for Judgment on the Pleadings in this case should be declined. The standard under which a Fed. R. Civ. P. 12(c) motion is decided is not the issue here. The Rule does not require "clarification." Motions for judgment on the pleadings, by definition, are invariably case-specific, and the trial court's decision to grant, or deny, such a motion always depends upon whether the Complaint pleads facts, assumed to be true, showing the pleader may be entitled to relief.

In this case, Petitioner attached to the Complaint a written contract, involving the sale of goods with incidental services, which did not contain an express indemnification clause. The Complaint failed to allege WMI had been adjudicated a "tortfeasor," yet alleged WMI was entitled to complete, implied indemnification from EDA on the basis of Ohio common law. Under these circumstances, the Complaint did not demonstrate, on its face, the Petitioner was "entitled to relief" for the purpose of defeating a motion for judgment on the pleadings.

This case involves no state or federal constitutional question, no issue of federal law, and no issue of great and general public importance. The Sixth Circuit's decision does not conflict with any decision rendered by this Court, any U.S. Circuit Court decision, or any decision of the Ohio Supreme Court. Nor did the lower courts apply Fed. R. Civ. P. 12(c) in a manner inconsistent with earlier decisions, or in a manner inconsistent with the standard applied in other federal jurisdictions. Under these circumstances, there is no justifiable basis for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

WAGNER-MEINERT, INC.
Petitioner,
v.
EDA CONTROLS CORP.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO BRIEF IN OPPOSITION

Pursuant to the United States Supreme Court Rule 15.6, Petitioner submits the following short response addressing new points raised in Respondent's Brief in Opposition.

In Respondent's Brief in Opposition, both the facts and the law have been misstated in significant respects. That is done as a slanted interpretation of the facts and law which continues to urge misapplication or confusion of the requirements of a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Therefore, even Respondent's brief demonstrates the need for clarification and instruction from this honorable Court regarding application of such a motion for judgment on the

pleadings.[1] This case, Petitioner submits, demonstrates the need for review and instruction.

Many courts do either properly apply or give lip service to the application of the principle that in construing a pleading such as the complaint herein, all of the allegations of fact are to be taken as true and all inferences favorable to the non-movant are to be drawn. *Bryson v. Brand Insulations, Inc.*, 621 F. 2d 556 (3rd Cir. 1980); *Grease Monkey Intern., Inc. v. Watkins*, 808 F.Supp. 111 (D. Conn. 1992) and several other examples previously cited. Respondent, however, has obviously taken the opposite position - that facts are to be inferred in favor of movant and

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[1] Petitioner initially demonstrated on pages 12-20 of the Petition for Writ of Certiorari the wide range of interpretation and application of a motion for judgment on the pleadings in several jurisdictions.

against the pleader/non-movant, and the courts below have discretion to do so.

Among the many examples demonstrated by Respondent's Brief in Opposition to the Petition are the following:

1. The complaint "makes oblique reference to possible 'oral' or 'implied' agreements", but does not allege any of the material terms attendant to those agreements, including the subject matter of the contracts.

   RESPONSE: That is a clear misstatement of fact. The complaint specifically alleges such agreements - even though not entirely written or fully described in the quotation and purchase order as to properly training the customer's employees in the operation and maintenance of the system, provision of specific services and the supply of equipment fit for intended use. They indeed may be oral or, in other words, "expressed" as well as implied.

2. Respondent repeatedly references the "*possible* existence of additional oral contracts" that "*might* have afforded WMI some basis for recovery" (Respondent's Brief, p. 12).

RESPONSE: The complaint does not use those words.

3. Respondent makes repeated statements and arguments supporting application of the parol evidence rule and making reference to a "written contract", when in fact there is no document at all which constitutes a contract which is signed by both of the parties (Respondent's Brief, pp. 14-16).

RESPONSE: This argument constitutes factual misstatement and cites law in support of the parol evidence rule which clearly does not apply. The argument in support of the parol evidence rule, including *Glazer v. Lehman Brothers, Inc.*, 394 F.3d 444 (2005) and *Galmish v. Cicchini*, 90 Ohio St. 3d 22 (2000), concern detailed written and signed agreements which contained integration clauses. *Galmish*, supra, at 788. Both cases relied upon by Respondent, although initially cited and referenced by Petitioner, involve express written contracts with an integration clause. Examples of an integration clause include the following:

> This agreement constitutes the entire understanding of the parties, and may be modified only by a signed writing of both parties, excepting purchaser's right to extend this contract, and

> is binding on their heirs, assigns and successors of the parties.

Country Mart Coop. v. Smith, 124 Ohio App. 3d 159, at 171 (1997).

An integrated contract is a written contract which contains all the terms and conditions of the agreement. 17 Am. J. 2d Contracts, §260. It is only construing all of the allegations of the Complaint and attachments in favor of Respondent - as opposed to Petitioner - that the parol evidence rule has any application here, and it is a flat out factual misrepresentation that any document contained an integration clause here. They did not.

4. Respondent misapplies both the facts and the law by attempting to limit its liability to the relatively small price ($13,228) mentioned on the EDA quote, rather than the multi-million dollar cost Petitioner incurred due to Respondent's failure to comply with its agreements.

RESPONSE: Respondent ignores basic legal principles such as consequential damages and the legal effect of indemnity. Neither concept in any way limits Respondent's potential liability to the amount of the price quoted. None of the documents generated by Respondent contained any such limitation. It is again an argument without any factual or legal basis whatsoever.

5. Respondent mischaracterizes Petitioner's argument, stating as follows:

> Specifically, Petitioner requests the Court to hold that the "predominant purpose test" should only be applied to mixed contracts **by the jury or trier of fact, and not by the trial court, "as a matter of law".** The invitation to adopt such a rule should be declined.

RESPONSE: Again, Respondent misstates the facts. What Petitioner has requested is a determination and finding that judgment on the pleadings was inappropriate. Given the detailed allegations of the Complaint which should be presumed true in the context of a motion for judgment on the pleadings, said motion should have been denied and discovery permitted - after which either a motion for summary judgment or trial, depending upon

the circumstances and the evidence, should occur.

> This case, it is submitted, is appropriate to illustrate that such a decision should not be made as a matter of law **before any discovery or trial**. (Petition, p. 26)

Petitioner does not, as Respondent represents, request this Court to hold that the "predominant purpose test" in mixed contracts of sales and service must always be determined by a jury or finder of fact. There is no such statement or argument at all in the Petition for Writ of Certiorari. The essence and true characterization is that given the detailed allegations of the Complaint in this case and under any similar circumstances, discovery should be allowed and the dispositive motion for judgment on the pleadings - without any discovery - should be denied.

CONCLUSION

Respondent's Brief demonstrates that attorneys, courts and businesses providing goods and services as part of our economy would benefit from acceptance of this dispute. Petitioner respectfully requests this Court to not be influenced by the clear misstatements of fact and law contained in Respondent's Brief in Opposition to the Petition for Writ of Certiorari in this matter.

Respectfully submitted,
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